

THE
CONSTITUTIONAL
HISTORY OF ENGLAND

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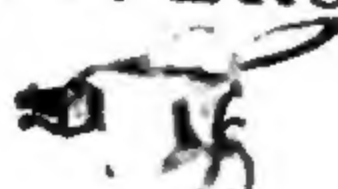
THE CONSTITUTIONAL HISTORY OF ENGLAND

A COURSE OF LECTURES
DELIVERED BY

F. W. MAITLAND

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PREFACE

"I have written a course of lectures in six months on Constitutional History. Do I publish it? No." The lectures written in six months, which Professor Maitland told the Cambridge Law Club would not be published, were delivered during the Michaelmas term of 1887 and the Lent term of 1888, and were specially designed for the needs of undergraduates of the University of Cambridge reading for the Law Tripos. The last word of the last lecture was written on April 7, 1888.

Let us observe the date. Maitland had been recalled to Cambridge as Reader in English Law in 1883 and this is one of his early courses of academic lectures delivered before his election to the Downing Chair in the summer of 1888. It was written seven years before the appearance of the *History of English Law*, nine years before *Domesday Book and Beyond*, ten years before *Township and Borough*, twelve years before the *Introduction to Gierke's Political Theories of the Middle Ages*. From internal evidence it would seem that some of the earlier lectures were composed before the completion of *Bracton's Note Book* in 1887. Much of the ground which is here covered was afterwards traversed with greater deliberation and more elaborate scrutiny; some part of the journey Maitland had never the leisure to retrace. Yet the student of his work will find in these early discourses many of the

seminal ideas which were subsequently developed in the History of English Law, and here, as elsewhere, will admire the union of high speculative power with exact and comprehensive knowledge of detail. This volume then is not a specimen of Maitland's polished and mature work; it does not claim to be based upon original research; for much of his information the Reader of English Law was confessedly content to draw upon the classical text-books, Hallam, Stubbs, Dicey, Anson, the study of which he frequently commends to the attention of his audience. Yet although the manuscript was laid aside, and the larger theme was abandoned for more special researches into medieval law, the author would sometimes admit that, did time allow, the course of lectures upon Constitutional History might be worked up into a shape worthy of publication.

There is much to be said against printing work which was not intended for the press, and I should not have ventured to recommend the publication of these lectures but for three compelling reasons. The first is that the lectures cannot detract from Maitland's reputation; but must, on the contrary, if possible, enhance it, showing, as they do, that the profound student was also a brilliant populariser of knowledge. The second is that the lectures contain several new and original ideas, which Maitland had no opportunity of expressing in his later work and which we cannot afford to lose. The third is that there is no book, to my knowledge, which provides so good an introduction to the study of English Constitutional History or which is likely to be more highly valued by practical teachers of the subject at our Universities. I can vouch good and lawful men to warranty. Professor Dicey, Sir Courtenay Ilbert and Mr C. R. L. Fletcher were kind enough to look over the manuscript and concurred in urging its publication.

The editor's part has been insignificant. The lectures are printed as they were delivered, and there has been no attempt to rewrite, expand or compress wherever the manuscript was fairly written out. In a few places however the manuscript took the form of brief notes which have been expanded with as strict an economy of words as is consistent with grammar. In one place the substance of a missing page was happily recovered from notebooks kindly lent to the editor by Dr Pierce Higgins of Downing College and Mr A. H. Chaytor of Clare College. For the references and remarks in the foot-notes the editor is responsible, save where they are followed by the initials of the author. The references to the Statutes have been verified.

Help has been generously given by many friends, in particular by Sir Courtenay Ilbert, who has contributed many valuable suggestions with reference to the last section of the volume. The editor will be grateful to his readers for any further suggestions by means of which a second edition of the book, should one be called for, may be made more fully worthy of the author and the subject.

H. A. L. FISHER.

NEW COLLEGE, OXFORD.

May 1908.

ANALYSIS¹

Outline of the course. Sketch of public law at five periods, (I) 1307, (II) 1509, (III) 1625, (IV) 1702, (V) the present day. Reasons for this choice of periods. The first and last sketches will be the most thorough.

PERIOD I.

ENGLISH PUBLIC LAW AT THE DEATH OF EDWARD I.

A. *General Characteristics of English Law and Review of Legislation.*

(i) Before 1066. Doms of the kings and witan ; substratum of traditional law (folk right) ; local customs ; theory of the three laws, West Saxon, Mercian, Danish ; formalism of traditional law ; Roman law unknown ; influence of the church ; characteristics of the dooms
Pages 1—6

(ii) 1066—1154. What law had the Normans? Survival of English law ; confirmations by William I and Henry I. Law books : *Leges Edwardi, Willelmi, Henrici Primi* ; fusion of English and Norman (Frankish) law. Genuine laws of William I ; charters of Henry I and Stephen ; Domesday Book **6—10**

(iii) 1154—1215. Henry II as a legislator ; Constitutions of Clarendon (1164) ; growth of Canon law ; study of Roman law ; 'assizes' ; possessory assizes and grand assize ; assizes of Clarendon (1166) and Northampton (1176). Law books : Glanvill (circ. 1188) ; *Dialogus de Scaccario* ; the first Plea Roll (1194) **10—14**

¹ Printed copies of this analysis or syllabus were supplied to those who attended the course of lectures. A few slight changes have been made, where the order of topics in the lectures does not correspond with that laid down in the analysis.

(iv) 1215—1272. The Charter: various editions, 1215, 1216, 1217, 1225; its character; beginning of statute book; Statute of Merton (1236), of Marlborough (1267); the Barons' war. Study of jurisprudence: Bracton (ob. 1268); Roman law and English 'case law'; evolution of common law 14—18

(v) 1272—1307. 'The English Justinian.' The great statutes, 1275 Westminster I, 1278 Gloucester, 1284 Wales, 1285 Westminster II and Winchester, 1290 Westminster III, 1297 *Confirmatio Cartarum*; their character and permanent importance. Edward as an administrator. Law books: Britton, Fleta. The first Year Book, 1292. Check on growth of unenacted law. Roman law ceases to be studied. Growth of class of lawyers. 'Common law,' contrasted with statute, local custom, ecclesiastical law; not yet with 'equity' 18—23

B. *The Land Law.*

Reasons for starting with land law 23—24

Theory of tenure. Subinfeudation: stopped by Statute of Westminster II; the feudal formula *A tenet terram de B.* Tenure and service. Classification of tenures: (1) frank almoign; (2) knight's service; the knight's fee; homage, fealty; aids, reliefs, primer seisin, wardship, marriage, fines on alienation, escheat; (3) grand serjeanty; (4) petty serjeanty; (5) free socage; incidents of socage tenure; (Note, classification of tenures not a classification of lands; the same land may be held by several tenures. Note military service done only in the king's army;) (6) villeinage; villein status and villein tenure; *tenementum non mutat statum* 24—35

Definition of freehold; *liberum tenementum* opposed to *villanum tenementum*; afterwards also to chattel interests. Treatment of chattels; testamentary causes go to court christian; no wills of freehold; primogeniture, its gradual spread.

[The manor and its courts; court baron and customary court; who were the judges? Had every manor freeholders? No more manors to be created (1290).]

Feudal ideal;—no connection between lord and vassal's vassal; this ideal to be had in mind that we may see how far it is realized 35—39

C. *Divisions of the Realm and Local Government.*

(i) The shire; its history; shire moot; ealdorman; sheriff; the Norman earl (*comes*) and Norman sheriff (*vicecomes*). The county

court (shire moot) not feudalized ; its constitution ; its political importance ; quasi-corporate character of county ; acts as a whole for many purposes ; election of coroners (1194) ; struggle for elective sheriffs ; the county (court) represented in parliament . 39—44

(ii) The hundred ; its history ; hundred moot : quasi-corporate character of the hundred ; its duties ; represented in the eyres by jurors. Hundreds in private hands ; the court leet and the sheriffs turn ; the serjeant of the hundred . 44—46

(iii) The vill or township ; its duties ; represented in the eyre by reeve and four men ; election of the reeve. Relation of the township to the manor . 47—52

(iv) The boroughs ; each borough has its own history ; generalization difficult. Privileges of boroughs may be brought under several heads : (a) immunities ; (b) courts of their own, like hundred-courts ; (c) elective officers, *baillivi*, *praepositi* ; (d) collection of royal dues, the *firma burgi* ; (e) guilds. The city of London. The notion of a corporation (juristic person) not yet formed ; but the greater towns have what are afterwards regarded as the powers of corporations 52—54

D. Central Government.

Retrospect :—

(i) Before 1066. King and witan ; actual composition of witenagemot ; theory that it had been a folk moot ; the bishop ; the ealdorman ; the thane (*minister regis*). Tendency towards feudalism. Powers of this assembly ; election and deposition of kings, appointment of officers, legislation, judicature, etc. ; but really there is little central government. Kingship increases in splendour ; but rather in splendour than in power . 54—60

(ii) 1066—1154. Title to the kingship ; practical despotism of Norman kings ; tradition of counsel and consent maintained. The *Curia Regis*, how far formed on feudal lines ; number of tenants in chief ; suit of court a burden. The *curia Regis* in a narrower sense ; the administrative body ; the officers of state, justiciar, chancellor ; the exchequer and its routine . 60—64

(iii) 1154—1216. Definition in Charter (1215) of *commune consilium regni*. Who were the *barones majores* and what was a *baronia* ? Line of demarcation gradually drawn among tenants in chief. Assemblies under Henry II ; consent to legislation and taxation. The administrative and judicial body ; professional judges under Henry II ; itinerant judges ; the barons of the exchequer

(iv) 1216—1295. Changes in the Charter. Growth of representation; parliament of 1254; later parliaments; events of 1261, 1264, 1265; doubts as to constitution of later parliaments; parliament of 1295 becomes a model 69—75

Constitution of parliament of three estates.

(1) *Clergy*: the bishops, their two-fold title; abbots; the inferior clergy; *praemunientes* clause; parliament and the convocations 75—78

(2) *Baronage*: difficulties created by demand for a strict theory; tenure by barony and barony by tenure; barony by writ; a distinct theory of hereditary right supersedes a vaguer theory of right by tenure. Judges and other councillors summoned; their position 78—84

(3) *Commons*: communes and *communae*; the electors in the shire; representation of the county court; the boroughs; demesne and other boroughs; the electors in the boroughs; non-representation of the palatinates 85—90

Magna Concilia as contrasted with *Parliamenta*: specification of terms 90

The *Concilium Regis*; growth during minority of Henry III; relation of council to parliament, as yet undefined.

1. Legislation; in parliament, in a *Magnum Concilium*, in the permanent council. Line between statute and ordinance slowly drawn.

2. Taxation; sources of royal revenue, profits of demesne lands, feudal dues, profits of justice, sale of privileges and offices, ecclesiastical dues, tallage of demesne lands, customs; extraordinary revenue, Danegeld, carucage, taxes on movables. Consent necessary to taxation; charter of 1215; practice under Henry III and Edward I; crisis of 1297; the *Confirmatio Cartarum* and *De Tallagio non concedendo* 91—96

The kingship; becoming hereditary; coronation oaths. 'The king can do no wrong':—meaning of this. Theory of kingship in Bracton; the right to revolt. Modern notion of 'sovereignty' inapplicable; denied by current doctrine of church and state. The king as a legislator; Glanvill and Bracton on *Quod principi placuit*, etc. Legislation by means of new writs; can the king make new writs?—a limit set to this power 97—105

E. *Administration of Justice.*

The courts are (1) communal, (2) feudal, (3) royal, central and permanent, (4) royal, local and temporary (visitatorial), (5) ecclesiastical. General principles as to their competence.

The king's court to start with, (a) a court of last resort when justice denied, (b) a court for the tenants in chief, (c) a court for pleas of the crown 105—107

Growth of royal jurisdiction:—

(i) Criminal. Pleas of the crown; in Canute's laws; in *Leges Henrici Primi*; gradual extension by means of the ideas of (a) king's peace, (b) felony. The appeal and indictment 107—111

(ii) Civil. Lines of progress, (1) evocation of causes *quod nisi feceris*, etc.; (2) no one need answer for freehold without writ; (3) royal procedure of grand assize; (4) royal possessory assizes; (5) writs of *praecipe*; contempt of king's writ; (6) king's peace; action of trespass. The king's court offers advantages to suitors, e.g. trial by jury 111—115

History of procedure. Archaic procedure; proof comes after judgment and is an appeal to the supernatural: oaths; compurgation; formal witness procedure; ordeals; (after Conquest) battle. Germ of jury-trial not to be found in England; but in prerogative procedure of Frankish kings; the Frankish *inquisitio*; trial by the oath of presumably impartial neighbour-witnesses; introduced into England as a royal privilege; Domesday book. Generalization of inquest procedure under Henry II; *regale beneficium*; (1) grand assize, (2) possessory assizes, (3) the *jurata* in civil cases, (4) the accusing jury (connexion with Ethelred's law disputed), (5) the *jurata* in appeals and indictments; *peine forte et dure*. Jurors still witnesses at end of thirteenth century. Local courts never attain to trial by jury 115—132

The courts in the time of Edward I. Work of (a) communal, (b) feudal courts, rapidly diminishing: Statute of Gloucester. (c) The king's central court has divided itself; extinction of the justiciarship; (i) king's bench, (ii) common pleas, (iii) exchequer, (iv) king in parliament, (v) king in council. History of the (a) visitatorial courts; justices in eyre; the more modern commissions, (1) assize, (2) gaol delivery, (3) *oyer et terminer* 132—141

F. *Retrospect of Feudalism.*

Notion of a 'feudal system,' as a system of European common law introduced by Spelman, popularized by Wright and Blackstone; an early effort of comparative jurisprudence; it is valuable, but differences between various countries are great and should not be overlooked 141—143

Attempts to define feudalism. How far was the feudal idea realised in England?

Tendency towards feudalism in Anglo-Saxon law; the territorialization of legal relationships; its economic causes. (1) The thegnage; the thegn as a landowner; military duty and land-owning; folkland becoming *terra Regis*. (2) The duty of having a lord imposed by the state. (3) Grants of jurisdiction. (4) Dependent landowners; villeinage 143—151

Feudalism in the Frank Empire; *beneficium* and *feodum*; the breaking up of the *dominium*. Jurisdiction in private hands. The king *primus inter pares*. Relation of the Duke of Normandy to the king of the French.

In what sense William introduced feudalism. The theory of tenure: all land brought within it; a quiet assumption; feudal tenure not the mark of a noble or military class. So far as feudalism is mere private law England is the most feudalised of all countries

152—158

Gradual development of doctrine of military service by means of particular bargains; not completed until scutage is imposed and feudalism is on the wane. Elaboration of 'incidents of tenure' is also gradual; burdens of wardship and marriage unusually heavy in England.

But political influence of feudalism is from the first limited. (1) Oath of allegiance exacted. (2) Man never bound by law to fight for any but the king; private war never legal. (3) Duty of all to serve in army irrespective of tenure is maintained. (4) Taxation not limited by feudalism. (5) Feudal justice has but a narrow sphere; communal courts retained and not feudalised. (6) King's court and council not definitely feudalised 158—164

PERIOD II.

SKETCH OF PUBLIC LAW AT THE DEATH OF HENRY VII.

A. *Parliament.*

1. *Its Constitution.*

History of the three estates.

(i) Clergy:—bishops, abbots; non-attendance of clerical proctors.

(ii) Lords:—the dukes, marquises, viscounts. Peerage by patent and peerage by writ. Barony by tenure. Number of peers. Idea of 'peerage'; right to trial by peers admitted, but within narrow limits. Court of the High Steward. The peerage not a caste. Preponderance in the House of Lords of lords spiritual.

(iii) Commons:—Number of members. The county franchise; the forty shilling freehold. Number of boroughs represented. The borough franchises. Wages of members.

Arrangement of Parliament in two houses; when effected. Functions of the two houses. Wording of the writs . 165—177

2. *Frequency and Duration of Parliaments.*

Annual Parliaments. Statutes of 1330 and 1362. Intermissions of Parliaments become commoner under Edward IV . 177—178

3. *Business of Parliament.*

We must not start with a theory of parliamentary sovereignty; such a theory the outcome of struggles 179

(i) Taxation:—here the need of Parliaments is established. Direct taxation without consent of Parliament becomes impossible. History of indirect taxation. Benevolences. Parliamentary taxation; taxation of clerical estate. Money grants to be initiated by the Commons: form of grants. Tonnage and poundage. Wealth of Henry VII. Change in the king's financial position. Purveyance and preemption. Audit of accounts and appropriation of supplies 179—184

(ii) Legislation. Changes in the legislative formula. Original equality of commons and clergy. Declaration of 1322. Gradual coordination of lords and commons. *Magna concilia*. Legislation by the king's Council; ordaining and dispensing powers. Forms of bill and statute. Royal dissent. Growing bulk of statute law: character of the statutes 184—190

B. The King and his Council.

The king's title : events of 1327 and 1399. Title of Henry IV, Edward VI and Henry VII. Legitimism of the Yorkists 190—195

His powers or 'prerogatives': their wide and indefinite extent. The character of the kingship varies with the character of the king; but law varies little. Thus the (so-called) 'New Monarchy' is introduced without change in the law. Fortescue's theory of the kingship 195—199

The Council: its constitution; its constantly changing character. Royal minorities and regencies. The Council as a council of regency. Under Edward IV and Henry VII it becomes strong as against the people, weak as against the king. The king's seals; 'ministerial responsibility.' Functions of the Council . 199—203

C. Administration of Justice.

Decay of feudal and communal courts. The justices of the peace; their history; their ever-growing powers; summary penal jurisdiction; their connexion with the council. The three courts of common law. The commissions of assize, etc. The nisi prius system. Trial by jury; changes in its character; in civil cases; in criminal cases; grand and petty juries; *peine forte et dure*. Appeals and indictments. Fortescue on the jury 204—213

Jurisdiction of the Parliament (i.e. for this purpose, House of Lords):—(i) trial of peers, (ii) writs of error, (iii) impeachments. Contrast between impeachments and acts of attainder; early instances 213—216

Jurisdiction of the Council, (1) as courts of error,—this suppressed; (2) as a criminal tribunal of first instance; statutes and petitions against it; gradual acquiescence of Parliament; jurisdiction of Council acknowledged by statute; question as to the legality of the jurisdiction; the Act of 1487. (3) Jurisdiction of Council in civil cases; growth of the Court of Chancery 216—221

The chancellor and his powers. Petitions to the king for civil relief referred to the chancellor. He is warned off the field of common law; but acquires an 'equitable' jurisdiction. Nature of Equity; becomes a supplemental system of law 221—226

D. *General Characteristics of English Law.*

Common Law; its conservatism; its development under Edward IV and Henry VII; new forms of action. Text books and reports.

Statute law; characteristics of medieval statutes; growth of economic legislation.

Remarks on criminal procedure. History of the law of treason
226—236

PERIOD III.

SKETCH OF PUBLIC LAW AT THE DEATH OF JAMES I.

A. *Parliament.*

1. *Constitution of Parliament.*

(i) House of Lords. Disappearance of the abbots; legislation as to the appointment of bishops. Number of temporal lords.

(ii) House of Commons. Number of members. Creation of new boroughs.

The clergy have practically ceased to be an estate of the realm; taxes still voted in convocation, though confirmed by statute

237—240

2. *Privileges of Parliament.*

‘Privilege’ now an important topic.

(a) Freedom of debate; Haxey’s case; Thorpe’s case; Strode’s case; Strickland’s case; Wentworth’s case; Elizabeth’s views and James’s; events of 1621.

(b) Freedom from arrest; statute of 1433; Ferrer’s case; Shirley’s case; statute of 1604.

(c) Punishment for contempt; cases of Storie, Parry, Bland, Floyd 240—245

3. *Jurisdiction of Parliament.*

i.e. of House of Lords, (a) as a court of error, (b) in trial of peers, (c) in impeachments: revival of impeachments; their importance.

Jurisdiction as a ‘privilege’ of House of Lords. Acts of attainder
245—246

4. *Functions of the Commons in granting money* 247

5. *Right to determine disputed Elections.*

Claim of Commons to decide disputes as to elections; Nowell’s case; events of 1586 247—248

6. *Parliamentary procedure.*

The outlines now drawn; proxies and protests of the lords; the king in the House of Lords 248

7. *Frequency and Duration of Parliaments.*

Long Parliaments of Henry VIII and Elizabeth ; long intervals without a session ; old statutes as to annual Parliaments not repealed. Important results of long Parliaments . 248—251

B. *Relation of the King to Parliament.*

Pliability of Tudor Parliaments ; forced loans ; forgiveness of the king's debts ; growing independence of Parliaments under Elizabeth and James.

Supremacy of king in Parliament made apparent by (1) acts of attainder ; (2) forgiveness of the king's debts ; (3) repeated settlements of royal succession ; will of Henry VIII ; (4) 'the *Lex Regia* of England' (1539) and its repeal ; (5) acts enabling the king to revoke statutes ; their repeal ; (6) interferences with religion. Sir Thomas Smith on supremacy of king-in-Parliament . 251—255

But in many directions the king's power is ill defined ; constitution of the Council. Want of definition illustrated :

(1) In legislation. The ordaining power ; instances of proclamations ; resolution of the judges in Mary's reign ; parliamentary protests. Council in Star Chamber enforces proclamations 255—258

(2) In fiscal matters. The 'impositions' ; Bates' case ; Coke's opinion ; difficulty caused by wide extent of undoubted prerogatives, e.g. as to debasing the coinage. Benevolences. Monopolies ; statute against them ; sale of privileges in the Middle Ages . 258—261

(3) In judicial matters. (i) The Court of Star Chamber ; theories as to its origin and legality ; Plowden's opinion ; statute of 1562 ; Coke's opinion. Connexion with the now well-established Court of Chancery. Its procedure ; arbitrary punishments ; use of torture. (ii) The Council of the North. (iii) The Council of Wales ; doubts as to its jurisdiction. Usefulness of these courts, owing to decay of old local courts. (iv) The High Commission ; Coke's opinion as to king's ecclesiastical supremacy ; his opinion as to the Commission. (v) Commissions of martial law ; the Court of the Marshal and courts martial ; precedents under Edward IV ; proclamations of 1588 and 1595 261—267

Prerogative and law ; illustrations from Coke's career ; the quarrel with the ecclesiastical courts ; the king no judge ; quarrel with the High Commission ; opinion as to impositions ; as to taking extra-judicial opinions from the judges severally ; quarrel with the Chancery ; case of the *commendams* ; his disgrace ; the four p's which ruined him.

Why controversy collects round the writ of habeas corpus ; its history ; statutes as to bailing prisoners. Is the king's command a cause for imprisonment? 'The resolution in Anderson.' Coke's change of mind.

The gathering storm. Where is sovereignty? . . . 267—275

C. *History of the Army.*

The feudal levy ; its clumsiness ; scutage. The Assize of Arms ; the Statute of Winchester ; the village constables. Commissions of array ; statutes of Edward III and Henry IV. No standing army. Act of Philip and Mary as to musters ; its repeal. Act of Philip and Mary as to keeping armour. Situation in James' reign. Difficulty as to (1) martial law, (2) obtaining money for payment of troops. Pressing for the navy legal 275—280

D¹. *Local Government.*

E¹. *General Characteristics of Law, especially Criminal Law.*

F¹. *Legal History of the Reformation.*

PERIOD IV.

SKETCH OF PUBLIC LAW AT THE DEATH OF WILLIAM III

A. *Constitution of the Kingship.*

Legal theory of Restoration and Revolution. The Convention Parliament and the Convention ; were they Parliaments? Attempts to legalize their acts. James' 'abdication' ; its date ; existence of an interregnum. Was there a Revolution?

Settlement of the succession ; the forfeiture clause. New coronation oath ; history of the old oath ; charges against Laud of tampering with it ; quarrel as to its meaning . . . 281—288

B. *Constitution of Parliament.*

(i) House of Lords. Expulsion and restoration of the bishops. Number of the lords. Abolition of the House in 1649.

¹ Maitland appended a note to the effect that these subjects would be treated 'if time serves.' Time did not serve, but the Legal History of the Reformation is briefly summarised later—pp. 506—13.

(ii) House of Commons. Number of members ; new boroughs ; prerogative of giving members to towns falls into disuse. Constitution of Cromwell's Parliaments. Electoral qualifications ; forfeiture of borough charters. Qualification of members ; the projected exclusion of place-men by the Act of Settlement. Disputes as to elections decided by the House 288—292

C. *Frequency and Duration of Parliaments.*

Laws of 1641, 1664, 1696. Chronological summary of sessions
292—297

D. *The Question of Sovereignty.*

The theory of Hobbes. In 1625 three claimants for sovereignty : (1) king, (2) king-in-Parliament, (3) the Law. Opinion of the judges in the Ship-Money case ; the king above statute. Logical flaw in the royalist argument :—it does not go far enough. The claim of 'the Law' ; Coke's theory as to void statutes ; past legislation renders it difficult to maintain this claim ; what cannot statute do ? The issue lies between (1) and (2), and is decided in favour of (2). The progress of the dispute may be seen in several different departments 297—301

E. *Legislation.*

Dispute as to (1) ordaining power ; proclamation of Charles I ; abolition of Star Chamber ; (2) dispensing power ; doubts as to its limits ; treatment of it at the Revolution ; (3) suspending power ; treatment of it at the Revolution ; case of the Seven Bishops
302—306

F. *Taxation and Control over Finance.*

Under Charles I ; the impositions ; the forced loan ; the Petition of Right ; the ship money ; legislation of 1641. Taxation by James II. The Bill of Rights.

Appropriation of supplies ; events of 1624 and 1665 ; impeachment of Danby ; beginnings of the civil list. The Commons and money bills ; the 'tacking' in 1700. Taxation of the clergy. Abolition of military tenures, purveyance, preemption ; grant of the hereditary excise 306—311

G. *Administration of Justice.*

Abolition of Star Chamber, High Commission, Councils of the North and of Wales. Restoration of High Commission by James; denounced in Bill of Rights. Escape of the Chancery.

Change in the commission of the judges; enforced by Act of Settlement. Independence of jurors; Bushell's case.

The habeas corpus; Darnel's case; Eliot's case; the Act of 1679; excessive bail forbidden.

The era of impeachments; various points settled by decision. Changes in the law of treason. Acts of attainder. Disputes between the Houses as to the jurisdiction of the House of Lords, (*a*) as a court appeal from Chancery, (*b*) as a court of first instance.

Jurisdiction of the Council in admiralty and colonial cases

311—320

H. *Privilege of Parliament.*

(1) Freedom of speech; Eliot's case. (2) Freedom from arrest; arrest of the five members; extent of the privilege. (3) Power to punish for 'contempt'; what is contempt? Assertions of privilege above law 320—324

I. *Military Affairs.*

The commissions of martial law; billeting of troops; impressment, 'the power of the militia.' Settlement at the Restoration; growth of the standing army; commissions of martial law under Charles II and James II. Settlement at the Revolution; the first Mutiny Act; control of Parliament over the standing army. Necessity for annual sessions. The remodelled militia 324—329

PERIOD V.

SKETCH OF PUBLIC LAW AT THE PRESENT DAY (1887-8).

Preliminary.

1. Though concerned chiefly with England we must remember that England is no longer a state but is a part of the United Kingdom.

Incorporation of Wales in England. Union with Scotland; 'personal union' in 1603; legislative union in 1707; scheme of the

union; the 'fundamental conditions.' Relation of Ireland to England in Middle Ages; Poynings' law; questions as to authority of English statutes and judicial power of English House of Lords; Act of 1719; Act of 1783 freeing Irish Parliament from subjection; union of 1801; articles of the union. No federation of three kingdoms, but a complete merger in the United Kingdom of Great Britain and Ireland.

Colonies and Dependencies; general principles as to laws in force in them; subjection to legislature of Great Britain and Ireland; taxation of the American colonies. Abolition of slavery and other instances of legislation for colonies. Colonial constitutions; crown colonies and self-governing colonies; wide powers of legislation given to colonial assemblies.

Distinguish institutions which are merely English, from those common to Great Britain or to the United Kingdom or to all the king's dominions; e.g. there is no English Parliament, no English nationality, but English courts of law, English domicile.

Now it becomes important to distinguish carefully rules of law from rules which however punctually observed are rules of 'positive morality,' 'customs or conventions of the constitution,' 'constitutional understandings'; these are much interwoven; reason of this, our conservatism of form 330—343

A. *The Sovereign Body.*

✓ I. *The kingship*; statutory settlement of succession; queens; queens' husbands. 'The king never dies.' Coronation oath; declaration against Popery; king must 'join in communion with' English church. Royal Marriage Act. No legal mode of deposing king.

Infant and incapable kings; common law makes no provision; king never legally incapable; minorities provided for by occasional statutes; events of 1788 and 1810 when George III was insane; great seal used without king's assent 343—346

II. *The House of Lords.* Lords Spiritual; legislation as to the new bishoprics. Irish bishops have come and gone. Mode of appointing bishops.

Lords Temporal; increase of numbers; representatives of Scottish and Irish peers; mode of making peers 347—351

III. *The House of Commons.* (1) Fluctuation in number; the Acts of Union 351—352

(2) Qualification of electors in counties and boroughs. The reforms of 1832-67-84. Present state of law.

Distribution of seats. Parliamentary and municipal organizations become distinct. Tendency towards equal electoral districts, but still distinctions between borough and county qualifications. causes of disqualification 352-364

(3) Qualification of members. History of parliamentary oaths. History of 'office' as qualification 364-370

Mode of election; introduction of the ballot 370

Determination of disputed elections 370

Modes of ceasing to be a member; expulsion; Wilkes' case 371-372

IV. *Frequency and Duration of Parliament.* Frequency depends on Triennial Act of 1694; (N.B. Act of 1664 repealed in 1887); duration on Septennial Act of 1715. Why annual sessions necessary. Legislation as to dissolution by demise of Crown 373-374

V. *Privileges of Parliament.* (1) Freedom of speech; exception out of ordinary law as to defamation; *Stockdale v. Hansard*, *Wason v. Walter*. Reporting. (2) Freedom from arrest; now of little importance. (3) Power of punishing for contempt; treatment of this power by courts of law; actual use of it 374-380

VI. *The Work of Parliament.* Other functions besides passing statutes; inquiry and criticism; examination of witnesses. Essentials of a statute; each House has large powers of regulating its own procedure; questions as to whether both Houses have really consented to what on its face professes to be a statute.

The omnicompetence of statute; it may not be a 'law' in the jurists' sense; instances of particular commands given by statute. In the eighteenth century Houses attempt to govern as well as legislate by statute. In the nineteenth century vast new powers have been given to ministers and law courts, and Parliament interferes less with particulars; but the power exists and is exercised, e.g. disfranchisement by statute of A, B, and C, corrupt voters, also Acts of Indemnity, also appropriation of supplies 380-387

B. *The 'Crown' and the 'Government.'*

Difficulty of dealing with this subject owing to the growth of 'constitutional understandings,' maintenance of ancient forms, and unwillingness to expressly take power from the king 387-388

Historical Review. Revolution settlement; large prerogatives left to William III which he was expected to exercise. Position of Privy Council and growth of Cabinet. How the Cabinet was legally possible. Attempt (1700) to stop by statute the growth of an inner council; repealed 1705 387—390

History of the great officers; chancellor, treasurer, keeper of privy seal, president of council, secretaries of state, chancellor of exchequer, admiral; treasury and admiralty in commission. These or some of these form an irregular inner council, with whose concurrence a king can exercise prerogatives; they have the seals; importance of the seals of office; no need to summon other councillors 390—394

Cabinet government of modern type slowly evolved; king ceases to be present at cabinet meeting; solidarity of cabinet slowly established (1) political unanimity, (2) common responsibility to Parliament (though not to the law), (3) submission to a 'Prime Minister.' Gradual retirement of king behind his Ministers, who are now expected to be in Parliament; he ought to take their advice, and choose them in accordance with wishes of Parliament (later, of House of Commons). All this 'extra-legal.' King's legal powers have not been diminished; on the contrary since the establishment of ministerial system have vastly grown owing to modern statutes. King's own sign manual or consent given at a (formal) meeting of Privy Council necessary for countless purposes. Other powers given to this or that high officer (cabinet minister). Distinguish prerogatives (i.e. common law powers) from statutory powers of king 394—400

Present State. (1) Necessary existence of Privy Council. (2) Its legal constitution. (3) And actual composition. (4) King may consult such privy councillors as he pleases and this is legally a meeting of the Privy Council. (5) Large powers of king in Council. (6) Necessary that king should have certain high officers (e.g. two Lords of the treasury, otherwise he cannot lawfully get the money that Parliament has voted). (7) Customary composition of the 'Cabinet' out of these high officers; as a body it has no legal powers. (8) But almost every member has large legal powers. (9) Customary composition of 'Ministry.' (10) Solidarity of Ministry, maintained by customary rules as to resignation and acceptance of office, but not recognized by law; ultimate sanction a refusal of supplies. (11) Legal tenure of high offices during king's pleasure. Choice of Prime Minister. (12) Relation of Cabinet to the Privy Council;

formal meetings of Privy Council (i.e. of king with a few ministers and sometimes a royal duke, or officer of household), at which king's powers are exercised in accordance with policy of Cabinet. (13) Many, but not all, royal powers must be exercised by Order in Council; but every (or almost every) exercise of royal power requires authentication by some high officer. Form of an Order in Council. Classification of delegated powers 400—407

Of some of the high officers and their legal powers. (1) The Lords of the Treasury, (2) the Secretaries of State; large legal powers in governing England of (Home) Secretary. (5) Board of Trade. (6) Local Government Board. (7) Education Department, etc. Illustration of actual working of government system 407—414

Object of illustrating these statutory powers:—Blackstone's statement that the high officers (e.g. secretaries) have few (if any) legal powers of their own, has become utterly untrue, though still repeated by text writers. The old theory (never very true) that 'legislative power is in king and Parliament, executive power in king' now requires serious modifications. Many powers of great importance are given by statute not to the king but to some high officer—e.g. power of making rules for the government of police given to Secretary of State. The requisite harmony between those who have these powers is obtained by the (extra-legal) organization of the Cabinet. Our law now knows not so much 'the executive power' as many executive (better, governmental) powers. This is obscured by talk about 'the Crown'; 'the Crown' is often a cover for ignorance; the king has powers and the high officers have powers, but the crown lies in the Tower.

Difficulties as to limits of king's prerogative powers; because instead of them new statutory powers are used; but a prerogative does not become obsolete by disuse and the clear words of a statute are necessary to take it away 415—421

C. *Classification of the Powers of the Crown.*

Shall deal with many in subsequent sections; but here (1) recall powers relating to constitution, assembling and dissolving of Parliament and turning bills into statute; (not correct to speak of king as having a 'veto'; he must actively assent; assent last refused by Anne); (2) note power of making war or peace; question as to power of ceding territory; power to make treaties, but treaty does not alter English law; illustration, extradition treaties; ambassadors; aliens; (3) appointment of offices 422—430

D. *The Fiscal System.*

Retrospect: the Crown lands and king's private estates, the national revenue and king's private revenue, gradual establishment of these distinctions. The 'ordinary' and 'extraordinary' revenue; decline in importance of former. History of hereditary excise and civil list; a king with a salary 430—438

History of Consolidated Fund and of National Debt. Charges on Consolidated Fund. Present sources of revenue. Most taxes imposed by permanent Acts: but supply granted only from year to year. Function of House of Commons in granting and appropriating supplies. How supplies expended; necessity of royal sign manual; method of voting supplies 438—447

E. *The Military System.*

Army. Annual Mutiny Acts; Army Act 1881; nature of its contents; 'Military law'; prerogative of making articles of war; billeting and impressment of carts; terms of soldiers' service how far fixed by statute; conscription in the eighteenth century; the command of the army. 447—454

Militia. The 'constitutional force'; models of 1662, 1757, 1786, 1802, 1853; suspension of the ballot; present plan 455—459

Navy. Contrast between treatment of Army and Navy; Acts of 1661, 1749, 1866. Pressing sailors 460—462

F. *Administration of Justice.*

Put on one side Judicial Committee of Privy Council; its great importance 462—464

a. System of Civil Courts. The great changes of the nineteenth century. The (new) County Courts; the Court of Chancery; the domain of modern equity; Chancery procedure; fusion of Equity and Common Law; the High Court of Justice; the High Court of Appeal; the House of Lords.

Court of Appeal, House of Lords. General rules as to their competence. Present relation of Equity to Law 464—473

b. System of Criminal Courts. (1) Courts of Summary Jurisdiction formed by justices of peace. (2) Quarter Sessions. (3) High Court. Writs of error to (4) Court of Appeal and (5) House of

Lords. (6) Court for Crown Cases Reserved. Trial of peers and impeachments before the House of Lords. Some notes on Criminal Law 473—478

c. Government and Justice:—(1) Independence of judges secured; (2) king has no powers over Civil Justice; but (3) has legally large powers over Criminal Justice; power of pardon; power to stop criminal proceedings; (4) 'the king can do no wrong'; meaning of this; petitions of right; (5) king's officers can be sued and prosecuted in ordinary way even for official acts 478—484

G. The Police System.

Continued decline and fall of sheriff; his present position. The parish constables; Act of 1842; special constables. The new constabulary; its government. Position of police constable; law of arrest; constant increase of police constable's statutory powers. Suppression of tumults; Riot Act; use of military force 485—492

H. Social Affairs and Local Government.

Only possible to hint at the existence of this great field of law which constantly grows wider; but at least its existence should be known.

Organs of local government:—

- (1) Justices of Peace 493—495
- (2) Municipal corporations; the reform of 1835 . 495—497
- (3) Poor Law Guardians; the reform of 1834 . 497—498
- (4) Sanitary authorities; acts of 1848 and 1875 . 498
- (5) School Boards, 1870. Progress of democratic representative government; bill (Act?) of 1888 for County Councils . 499—501

The new duties thus cast on the Englishman: some of which are active duties, e.g. to register child's birth, have it vaccinated, and sent to public elementary school. Also notice Expropriation Acts.

501—506

J. The Church.

Medieval theory of church and state; a denial of 'sovereignty.' Jurisdiction of ecclesiastical courts; temporal effects of excommunication; the Canon Laws; statutes against heretics. Endowments, not of 'the church,' but of churches. The Reformation 506—511

Subjection of church to king and Parliament. Legislation as to dogma and ritual. History of convocations ; their impotence

511—514

History of attempts to enforce conformity on Catholics and Protestant Dissenters ; Blackstone's account of laws against sectaries and papists. History of toleration. Present state of the case ; remaining religious disabilities ; laws against Jesuits ; heresy an ecclesiastical offence. Present condition and powers of ecclesiastical courts. Legal position of clerk in English orders contrasted with that of catholic priest and dissenting minister ; the former a 'status' ; 'the church' not a corporation, nor even a definite body of persons

514—526

K. *The Definition of Constitutional Law.*

Such terms as 'public,' 'constitutional,' 'administrative' law, not technical in England ; Austria's use of them, and Holland's. Theory that constitutional law deals with structure, administrative with function ; difficulty of taking this as outline for a code. Interdependence of all parts of the law ; e.g. main outlines of 'constitutional law' of Middle Ages are determined by 'real property law' ; constitutional struggles of seventeenth century not to be understood without knowledge of criminal procedure . 526—539

PERIOD I.

ENGLISH PUBLIC LAW AT THE DEATH OF EDWARD THE FIRST.

A. *General characteristics of English law and review of legislation.*

i. *Before 1066.*

The oldest English laws that have come down to us are those of Ethelbert, king of Kent, and we have good reason for believing that they were the first English laws that were ever put into writing. Ethelbert became king in 560 and died in 616. The laws that we have must have been published after he had received the Christian faith ; we may attribute them to the year 600 or thereabouts. Thus the history of English law may be said to begin just about the time when the history of Roman law—we will not say comes to an end, for in a certain sense it has never come to an end—but comes to a well marked period :—the reign of Ethelbert overlaps the reign of Justinian. Not only are Ethelbert's the earliest English laws, but they seem to be the earliest laws ever written in any Teutonic tongue. It is true that on the continent the German nations which overwhelmed the Roman Empire had already felt the impulse to put their laws in writing ; the *Lex Salica*, for example, the law of the Salian Franks, is considerably older than anything that we Englishmen have to show, but it is written in Latin, and for centuries Latin continued to be the legal language of the new kingdoms. But our earliest laws are written in English, or Anglo-Saxon, and until the Norman Conquest all laws were written in English, though

Latin was commonly used for many legal documents, conveyances of land and the like. Seemingly it was the contact with Roman civilization in the form of Christianity which raised the desire for written laws. Beda, who died in 735, says that Ethelbert put his laws in writing 'juxta exempla Romanorum.' It is possible that some collection of ecclesiastical canons served as a model. We do well to remember that the oldest laws that we have, however barbarous they may seem, are none the less Christian laws. 'God's property and the church's 12-fold. A bishop's property 11-fold. A priest's property 9-fold. A deacon's property 6-fold. A clerk's property 3-fold':—this is the first utterance of English law. This it is well to remember, for it should prevent any glib talk about primitive institutions: Teutonic law (for what is true of England is true also of the continent) when it is first set in writing has already ceased to be primitive; it is already Christian, and so close is the connection between law and religion, that we may well believe that it has already undergone a great change.

We have two more sets of Kentish laws, a set from Hlothar and Eadric, who seem to have been joint kings of the Kentings, which we may date in 680 or thereabouts, and a set from Wihtræd, which comes from 700 or thereabouts. Wessex takes up the tale; in 690 or thereabouts king Ine, with the counsel and consent of the wise, published a set of laws. Then we have a gap of two centuries, the greatest gap in our legal history. The laws of Alfred, which come next in order, may be attributed to 890 or thereabouts. They show us that during the two last centuries there had been no great change in the character of law or the legal structure of society. Alfred disclaims all pretension of being an innovator, he will but set down the best principles that he has been able to find in the laws of Ethelbert, of Ine and of the Mercian king, Offa. The laws of Offa of Mercia, who died in 796, have not come down to us.

Beginning with Alfred's we now have a continuous series of laws covering the whole of the tenth century and extending into the eleventh, laws from Edward the Elder, Æthelstan, Edmund, Edgar, and Ethelred; the series is brought to an end

by a long and comprehensive set of laws coming from our great Danish king, Canute. We have no one law that can be ascribed to Edward the Confessor, who, however, in after days acquired the fame of having been a great legislator.

These Anglo-Saxon laws or dooms—as they call themselves—after having lain hid in MS. for several centuries, were dug up in the sixteenth century as antiquarian curiosities. Lambard published some of them in 1568 under the title *Archaionomia*. In 1840 they were published for the Record Commissioners with a modern English translation under the title *Ancient Laws and Institutes of England*; they were again published in 1865 with a German translation by Dr Reinhold Schmid¹. These editions contain, besides the dooms, a few brief statements of customary law, forms of oaths and the like. The whole material can be printed in about 160 octavo pages. We have nothing from this period that can be called a treatise on law, and we have but very few accounts of litigation. On the other hand we have a large number of private legal documents, conveyances of lands, or land books as they were called, leases, wills and so forth; these were collected and printed by J. M. Kemble in his *Codex Diplomaticus Ævi Saxonici*.

I have spoken of 'sets of laws' and have refrained from using the word code. Once or twice it would seem as if an attempt had been made to state the existing law; but in general these laws seem to be new laws, additions to the law that is already in force; we may compare them to our modern statutes and like our statutes they pre-suppose a body of existing law. I will not say that they pre-suppose 'common law,' because I think that the phrase implies law common to the whole kingdom, and how much law there was common to the whole kingdom in the days before the Norman Conquest is a very difficult question. In the twelfth century, some time after the Conquest, it was the established theory that England was or had been divided between three laws, the West-Saxon, the Mercian and the Danish. The old laws themselves notice this distinction in a casual way; but we have little means of telling how deep it went. It is highly

¹ The best edition is now that of F. Liebermann, *Die Gesetze der Angelsachsen*, 2 vols., Halle, 1903 and 1906.

probable, however, that a great variety of local customs was growing up in England, when the Norman Conquest checked the growth. Originally there may have been considerable differences between the laws of the various tribes of Angles, Saxons and Jutes that invaded Britain, and the Danes must have brought with them a new supply of new customs. But this would not be all; the courts of justice, as we shall presently see, were local courts, courts of shires and of hundreds; resort to any central tribunal, to the king and his wise men seems to have been rare, and this localization of justice must have engendered a variety of local laws. Law was transmitted by oral tradition and the men of one shire would know nothing and care nothing for the tradition of another shire.

The written laws issued by the king and the wise cover but a small part of the whole field of law. They deal chiefly with matters of national importance, in particular with the preservation of the peace. To keep the peace is the legislator's first object, and is not easy. The family bond is strong; an act of violence will too often lead to a blood feud, a private war. To force the injured man or the slain man's kinsfolk to accept a money composition instead of resorting to reprisals is a main aim for the law giver. Hence these dooms often take the form of tariffs—so much is to be paid for slaying an eorl, so much for a ceorl, so much for a broken finger, so much for a broken leg. Another aim is to make men mindful of their police duties, to organize them for the pursuit of robbers and murderers, to fine them if they neglect such duties. But of what we may call private law we hear little or nothing—of property, contract or the like. It is easy to ask very simple questions about inheritance and so forth to which no certain answer can be given, and like enough there were many different local customs. There was as yet no body of professional lawyers, law was not yet a subject for speculation; it was the right and duty of the free man to attend the court of his hundred and his shire, and to give his judgment there. This must not, however, lead us to believe that law was a simple affair, that it consisted of just the great primary rules of what we think natural justice. In all probability it was

very complicated and very formal; exactly the right words must be used, the due solemnities must be punctually performed. An ancient popular court with a traditional law was no court of equity; forms and ceremonies and solemn poetical phrases are the things which stick in the popular memory and can be handed down from father to son.

A great deal has been done by modern scholars and a great deal more may yet be done towards reconstructing the Anglo-Saxon legal system. Besides the primary sources of information that I have mentioned, the evidence of Caesar and Tacitus, the kindred laws of other German tribes and books written in England after the Conquest may be cautiously employed for the purpose: but for reasons already given I do not think that this matter can be profitably studied by beginners; we must work backwards from the known to the unknown, from the certain to the uncertain, and when we see very confident assertions about the details of Anglo-Saxon law we shall do well to be sceptical. One point however of considerable importance seems pretty clear, namely, that the influence of Roman jurisprudence was hardly felt. There is no one passage in the dooms which betrays any knowledge of the Roman law books. German scholars are in the habit of appealing to these Anglo-Saxon dooms as to the purest monuments of pure Germanic law; they can find nothing so pure upon the continent. But we must not exaggerate this truth. Roman jurisprudence did not survive in Britain, but the traditions of Roman civilization were of great importance. The main force which made for the improvement of law was the church, and the church if it was Catholic was also Roman. Thus, for example, at a quite early time we find the Anglo-Saxons making wills. This practice we may safely say is due to the church:—the church is the great recipient of testamentary gifts. We may further say that the will is a Roman institution; that these Anglo-Saxons would not be making wills, if there had been no Rome, no world-wide Roman Empire; but of any knowledge of the Roman law of wills, even of so much of it as is contained in the Institutes we may safely acquit them. Suppose a party of English missionaries to go

preaching to the heathen, they would inevitably carry with them a great deal of English law although they might be utterly unable to answer the simplest examination paper about it; for instance they would know that written wills can be made, and they would think that written wills should take effect, though they might well not know how many witnesses our law requires, or whether a will is revoked by marriage. In some such way the church, Catholic and Roman, carried with it wherever it went the tradition of the older civilization, carried with it Roman institutions, such as the will, but in a popularized and vulgarized form.

I have spoken of the Anglo-Saxon dooms as the dooms of this king and of that, but we ought to observe, even in passing, and though this matter must come before us again, that no English king takes on himself to legislate without the counsel and consent of his wise men. Legislative formulae are of great importance to us, for we have to trace the growth of that form of words in which our Queen and Parliament legislate for us to-day. Here is the preface of the laws of Wihtræd: 'In the reign of the most clement king of the Kentish men, Wihtræd, there was assembled a deliberative convention of the great men: there was Birhtwald, Archbishop of Britain, and the fore-named king, and the Bishop of Rochester, Gybmund by name; and every degree of the church of that province spoke in unison with the obedient people. There the great men decreed these dooms with the suffrages of all, and added them to the customary laws of the Kentish men';—and so on until the end of the period, until the laws of Canute: "This is the ordinance that king Canute, king of all England, and king of the Danes and Norwegians, decreed, with the counsel of his 'witan' to the honour and behoof of himself."

ii. 1066–1154.

The Norman Conquest is an event of the utmost importance in the history of English law; still we must not suppose that English law was swept away or superseded by Norman law. We must not suppose that the Normans had any compact body of laws to bring with them. They can have had but

very little if any written law of their own ; in this respect they were far behind the English.

Since 912 these Norsemen had held a corner of what had once formed a part of the great Frank kingdom ; but their dukes had been practically independent, owing little more than a nominal allegiance to the kings of the French. They had adopted the religion and language of the conquered, and we must believe that what settled law there was in Normandy was rather Frankish than Norse. They were an aristocracy of Scandinavian conquerors ruling over a body of Romance-speaking Kelts. No one of their dukes had been a great legislator. Such written law as there was must have already been of great antiquity, the *Lex Salica* and the capitularies of the Frankish kings, and how far these were really in force, we cannot say. The hold of the dukes upon their vassals had been precarious ; but probably some traditions of strong and settled government survived from the times of the Carlovings. For instance, that practice of summoning a body of neighbours to swear to royal and other rights which is the germ of trial by jury, appears in England so soon as the Normans have conquered the country, and it can be clearly traced to the courts of the Frankish kings.

There is no Norman law book that can be traced beyond the very last years of the twelfth century ; there is none so old as our own *Glanvill*. Really we know very little of Norman law as it was in the middle of the tenth century. It cannot have been very unlike the contemporary English law—the Frankish capitularies are very like our English dooms, and the East of England was full of men of Norse descent. We must not therefore think of William as bringing with him a novel system of jurisprudence.

The proofs of the survival of English law can be briefly summarised. In the first place one of the very few legislative acts of William the Conqueror of which we can be certain, is that he confirmed the English laws. ‘This I will and order that all shall have and hold the law of king Edward as to lands and all other things with these additions which I have established for the good of the English people.’ Then again, after the misrule of Rufus, Henry I on his accession (1100)

confirmed the English law: 'I give you back king Edward's law with those improvements whereby my father improved it by the counsel of his barons.' Secondly, these confirmations of Edward's law seem to have set several different persons on an attempt to restate what Edward's law had been. We have three collections of laws known respectively as the *Leges Edwardi Confessoris*, *Leges Willelmi Primi*, *Leges Henrici Primi*. These are apparently the work of private persons; we cannot fix the date of any of them with any great certainty. The most valuable is the *Leges Henrici Primi*, which has been ascribed to as late a date as the reign of Henry II, but which the most recent investigations assign to that of Henry I. It is a book of some size, very obscure and disorderly. The author has borrowed freely from foreign sources, from the *Lex Salica*, the capitularies of the Frankish kings, and from collections of ecclesiastical canons—one little passage has been traced to the Theodosian Code; but the main part of the book consists of passages from the Anglo-Saxon dooms translated into Latin, and the author evidently thinks that these are, or ought to be, still regarded as the law of the land. The picture given us by this book is that of an ancient system which has undergone a very severe shock. So the compiler of the *Leges Edwardi Confessoris* has borrowed largely from the old dooms. His book did much to popularize the notion that the Confessor was a great legislator. In after times he became the hero of many legal myths; but as already said there is no one law that can be attributed to him. The demand for Edward's law which was conceded by William and by Henry I was not a demand for laws made by Edward; it was merely a demand for the good old law, the law which prevailed here before England fell under the domination of the Conqueror¹. Thirdly, Domesday book, the record of the great survey made in the years 1085-6—the greatest legal monument of the Conqueror's reign—shows us that the Norman landowners were conceived as stepping into the exact place of the English owners whose forfeited lands had come to their hands; the Norman repre-

¹ For a fuller account of the law-books of the Norman period see Pollock and Maitland, *History of English Law*, 2nd edn. vol. I, pp. 97-110. Stubbs, *Lectures on Early English History*, 37-133.

sents an English antecessor whose rights and duties have fallen upon him. The same conclusion is put before us by the charters of the Norman kings, the documents whereby they grant lands to their followers. It is in English words that they convey jurisdictions and privileges: the Norman lord is to have *sac* and *soc*, *thol* and *theam*, *infangthief* and *outfangthief*,—rights which have been enjoyed by Englishmen, rights which can only be described in the English language.

At the same time it must be admitted that there has been a large infusion of Norman ideas. Occasionally, though but rarely, we can place our finger on a rule or an institution and say 'This is not English.' Such is the case with trial by battle, such is the case with the sworn inquest of neighbours which comes to be trial by jury. More often we can say that a new idea, a new theory, has been introduced from abroad, this as we shall hereafter see is the case with what we call feudalism. But still more often we can only say that a new meaning, a new importance, has been given to an old institution. The valuable thing that the Norman Conquest gives us is a strong kingship which makes for national unity.

No one of the Norman kings, among whom we will include Stephen, was a great legislator. The genuine laws of William the Conqueror are few; of most of them we shall speak by and by. The two most important are that by which he severs the ecclesiastical jurisdiction from the temporal, and that by which he insists that every man, no matter of whom he holds his land, is the king's man and owes allegiance to the king. From the lawless Rufus we have no law. Henry the First on his accession (1100) purchases the support of the people by an important charter—important in itself, for it is a landmark in constitutional history, important also as the model for Magna Carta. Stephen also has to issue a charter, but it is of less value, for it is more general in its terms. It is as administrators rather than as legislators that William the First and Henry the First are active. The making of Domesday, the great rate book of the kingdom, is a magnificent exploit, an exploit which has no parallel in the history of Europe, an exploit only possible in a conquered country. Under Henry the First national finance becomes an orderly system, a system of

which an orderly written record is kept. The sheriff's accounts for 1132 are still extant on what is called the Pipe Roll of 31 Hen. I; this is one of our most valuable sources of information. It has been casually preserved; it is not until the beginning of Henry II's reign that we get a regular series of such records. To illustrate the Norman reigns we have also a few unofficial records of litigation. These have been printed by Mr Bigelow in his *Placita Anglo-Normannica*. The genuine laws of William I and the Charter of Henry I will be found in Stubbs' *Select Charters*. The so-called *Leges Edwardi Confessoris*, *Willelmi Conquestoris*, and *Henrici Primi* are among the Ancient Laws published by the Record Commissioners¹.

iii. *Henry II* (1154–89), *Richard* (1189–99), *John* (1199–1216).

The reign of Henry II is of great importance in legal history; he was a great legislator and a great administrator. Some of his laws and ordinances we have, they have been casually preserved by chroniclers; others we have lost. The time had not yet come when all laws would be carefully and officially recorded. At his coronation or soon afterwards he issued a charter, confirming in general terms the liberties granted by his grandfather, Henry I. The next monument that we have of his legislation consists of the Constitutions of Clarendon issued in 1164. Henry's quarrel with Becket was the occasion of them. They deal with the border land between the temporal and the ecclesiastical jurisdictions, defining the province of the spiritual courts. During the anarchy of Stephen's reign the civil, as contrasted with the ecclesiastical, organization of society had been well-nigh dissolved—the church had gained in power as the state became feeble. Henry endeavoured to restore what he held to be the ancient boundary, to maintain the old barriers against the pretensions of the clergy. These Constitutions are the result. To some

¹ The *Leges Edwardi Confessoris* and the *Leges Henrici Primi* may now be read in Liebermann's *Gesetze der Angelsachsen*. For a full and valuable commentary on the latter document see Stubbs, *Lectures on Early English History*, 143–65. For the *Leges Willelmi* see Stubbs, *Select Charters*, p. 84.

extent Henry failed : the murder of the Archbishop shocked the world, and shocked him, and he was obliged to surrender several of the points for which he had contended. Nevertheless in the main he was successful ; by the action of the royal court which now becomes steady and vigorous a line was drawn between the temporal and the spiritual spheres, though it was not exactly the line which Henry tried to define, and though for a century and more after his death there was still a debateable border land. The Canon law was just taking shape, a law for ecclesiastical matters common to all Europe. One great stage in its development is marked by the *Decretum Gratiani*, the work of a Bolognese monk, composed, it is believed, between 1139 and 1142, i.e. in our King Stephen's reign. The decrees of ecclesiastical councils, ancient and modern, genuine and spurious, were being elaborated into a great system of jurisprudence. The classical Roman law, which for some time past had become the subject of serious study, was a model for this new system. We have to remember that throughout the subsequent ages Canon law administered by ecclesiastical courts regulated for all Englishmen some of the most important affairs of life. It did not merely define the discipline of the clergy—all matters relating to marriages and to testaments fell to its share. A great deal of the ordinary private law even of our own day can only be understood if we remember this. The fundamental distinction that we draw between real and personal property, to take one example, is the abiding outcome of the division of the field of law into two departments, the secular and the spiritual. Why do we still couple 'probate' with 'divorce'? Merely because both matrimonial and testamentary causes belonged to the church courts.

We have just mentioned the revived study of Roman law. In Southern Europe Roman law had never perished : it had survived the dark ages in a barbarized and vulgarized form. Then in the eleventh century men began to turn once more to the classical texts. The new study spread rapidly. In 1143 Archbishop Theobald brought hither in his train one Vacarius, a Lombard lawyer. He lectured in England on Roman law ; it seems that Stephen silenced

him; Stephen had quarrelled with the clergy. But he did not labour in vain; the influence of Roman law is apparent in some of Henry's reforms, and it has even been conjectured that Henry as a youth had sat at the feet of Vacarius¹. To the early part of his reign we owe certain measures of the utmost importance. The text of the ordinances or assizes whereby they were accomplished we have lost. An assize (*assisa*) seems to mean in the first instance a sitting, a session for example of the king and his barons; then the name is transferred to an ordinance made at such a session—we have the Assize of Clarendon, the Assize of Northampton, and, to look abroad, the Assizes of Jerusalem; then again it is transferred to any institution which is created by such an ordinance. Henry by some ordinance that we have lost took under his royal protection the possession, or seisin as it was called, of all freeholders. The vast importance of this step we shall better understand hereafter. He provided in his own court remedies for all who were disturbed in their possession. These remedies were the possessory assizes of novel disseisin and mort d'ancestor; there was a third assize of darein presentment which dealt with the right of presenting to churches. Doubtless these possessory actions were suggested by, though they were not copied from, the Roman *interdicta*. The distinction between a possessory and a proprietary action was firmly grasped; proprietary actions still went to the feudal courts while the king himself now undertook to protect possession. All this will become more intelligible hereafter. But if the thought of protecting possession or something different from property was of Roman origin, the machinery employed for this purpose was of a kind unknown to the Romans, it was, we may say, a trial by jury. This new procedure gradually spreads from these possessory actions to all other actions. Henry himself extended it to proprietary actions for land—in the form of the grand assize. The person sued might refuse trial by battle and have the question 'Who has the best right to this land?' submitted to a body of his neighbours sworn to tell the truth. More of this by and by

¹ For a fuller account see Pollock and Maitland, *History of English Law*, vol. 1, pp. 118—9.

when we come to the history of trial by jury; our present point is that by providing new remedies in his own court Henry centralized English justice. From his time onwards the importance of the local tribunals began to wane; the king's own court became ever more and more a court of first instance for all men and all causes. The consequence of this was a rapid development of law common to the whole land; local variations are gradually suppressed; we come to have a common law. This common law is enforced throughout the land by itinerant justices, professional administrators of the law, all trained in one school. During the latter part of Henry's reign the counties are habitually visited by such justices.

By the Assize of Clarendon in 1166 reissued with amendments at Northampton in 1176 Henry began a great reform of criminal procedure. Practically, we may say, he introduced the germs of trial by jury: the old modes of trial, the ordeals and the judicial combat, begin to yield before the oath of a body of witnesses. From 1181 we have the Assize of Arms which reorganizes the ancient military force and thus establishes a counterpoise to feudalism. From 1184 we have the Assize of Woodstock, which for the first time defines the king's rights in his forests. The establishment of an orderly method of taxation and the decline of feudalism as a political force are marked by the first collection of a scutage in 1159—personal service in the army may be commuted for a money payment—and by the first taxation of personal property, the Saladin tithe of 1188.

Two great books illustrate the legal activity of the reign. The *Dialogus de Scaccario* describes minutely the proceedings of the Royal Exchequer. It was written by Richard Fitz Neal, Bishop of London and Treasurer of the Exchequer. The other book is a Treatise on the Laws of England, commonly attributed to Ranulf Glanvill, who became chief justiciar (prime minister and chief justice we may say) in 1180. This book, known to lawyers as 'Glanvill,' was written in the very last years of the reign, 1187–9. It is the first of our classical text books. It gives us an accurate picture of the working of the royal court. The law contained in it is mostly land

law: as yet it is with land that the royal court is chiefly concerned. We can see that Roman law has been exercising a subtle influence; the writer knows something of the Institutes and occasionally copies their words; but in the main the king's court has been working out a law for itself. It is only with the king's court that the writer deals. The customs which prevail in the local courts are, he says, so many, so various, so confused, that to put them in writing would be impossible. However by the action of the royal court a certain province has been reclaimed from local custom for common law; that province is 'land-holding' about which there are already many uniform rules. The book thus marks an important stage in the development of common law¹.

Henry's reign finished, we look onwards to Magna Carta. Under Richard the tradition of orderly administration, of the concentration of justice in the king's court was maintained. Richard himself was an absentee king; he never was in this country save on two occasions and then but for a few months; the country was governed by justiciars, by men trained in the school of Henry II. Our materials for legal history now begin to accumulate rapidly. Not that there is much that can be called legislation; but it now becomes the practice to keep an official record of the business done in the king's court. Our earliest judicial records come from the year 1194; thenceforward we have the means of knowing accurately what cases come before the king's justices and how they are decided. During the first half of John's reign the country was decently governed, though the legislative and reforming activity of his father's day has ceased. But then John casts off all restraints, becomes involved in a great quarrel with the church, in another with the baronage, unites the whole nation against him, and at length in 1215 is forced to grant the great charter.

iv. *Henry III* (1216–72).

The great charter, from whatever point of view we regard it, is of course a document of the utmost importance². The

¹ Pollock and Maitland, *History of English Law*, vol. 1, pp. 161–7.

² An admirable commentary on Magna Carta was published by W. S. McKechnie in 1905.

first thing that strikes one on looking at it is that it is a very long document—and a good deal of its importance consists in this, that it is minute and detailed. It is intensely practical; it is no declaration in mere general terms of the rights of Englishmen, still less of the rights of men; it goes through the grievances of the time one by one and promises redress. It is a definite statement of law upon a great number of miscellaneous points. In many cases, so far as we can now judge, the law that it states is not new law; it represents the practice of Henry II's reign. The cry has been not that the law should be altered, but that it should be observed, in particular, that it should be observed by the king. Henceforward matters are not to be left to vague promises; the king's rights and their limits are to be set down in black and white. Apart from the actual contents of the charter, which we must notice from time to time hereafter, we ought to notice that the issue of so long, so detailed, so practical a document, means that there is to be a reign of law.

Now Magna Carta came to be reckoned as the beginning of English statute law; it was printed as the first of the statutes of the realm. But to explain this we have first to remark that of Magna Carta there are several editions. We have four versions of the charter, that of 1215, that of 1216, that of 1217 and that of 1225, and between them there are important differences. Several clauses which were contained in the charter of 1215 were omitted in that of 1216 and were never again inserted. It seems to have been thought unadvisable to bind the young king to some of the more stringent conditions to which John had been subjected. The charter of 1217 again differs from that of 1216. Substantially it is in 1217 that the charter takes its final form; still it is the charter of 1225 which is the Magna Carta of all future times. That there were four versions is a fact to be carefully remembered; it is never enough to refer to Magna Carta without saying which edition of it you mean. As we shall hereafter see, the whole history of parliament might have been very different, had not a certain clause been omitted from the charter of 1216 and all subsequent versions—a clause defining the common council of the realm.

Now the charter of 1225 came to be reckoned as the beginning of our statute law. This in part is due to accidents. The lawyers of the later middle ages had no occasion to go behind that instrument; the earlier ordinances so far as they had not become obsolete had worked themselves into the common law; but every word of the charter was still of great importance. So when the time for printing came Magna Carta, i.e. the charter of 1225, took its place at the beginning of the statute book. It was constantly confirmed; Henry confirmed it in 1237; Edward confirmed it in 1297—thenceforward down to the days of Henry IV it was repeatedly confirmed; Coke reckons thirty-two confirmations. It was one thing to obtain the charter, another to get it observed. It was a fetter on the king, a fetter from which a king would free himself whenever he could; and the nation has to pay money over and over again to procure a confirmation of the charter:—that the king is bound by his ancestors' concessions is a principle that is but slowly established.

Magna Carta then, however ill it may be observed, constitutes what for the time is a considerable body of definitely enacted law. From the long reign of Henry III we have not much other legislation; legislation is as yet by no means a common event. The interest of the reign is to be found not so much in the laws that are made but in the struggle for a parliament. Gradually, as we shall see hereafter, the idea of what the national assembly should be is undergoing a change; it is ceasing to be that of a feudal assembly of barons, it is becoming that of an assembly of the three estates of the realm—clergy, lords and commons; the summoning of knights of the shire in 1254, and of representative burgesses in 1264 are the great landmarks. Still there are two important legislative acts. The first of these is known as the Statute of Merton made in 1236. It contains provisions which are in force at the present moment. Among its other noticeable clauses, we come across the famous declaration of the barons that they will not change the laws of England. They have been asked by the clergy to consent that children born before the marriage of their parents should be deemed legitimate:—their reply is '*Nolumus leges Angliae mutare.*' Between this

and the next great act, there occurs the great crisis which we know as the Barons' War. The discontent of the nation with Henry's faithlessness and extravagance comes to a head in 1258. After stormy years of quarrelling, a leader is found in De Montfort; the insurgents are victorious at Lewes (14 May, 1264), and then defeated at Evesham (4 Aug. 1265). But a great deal of what they wanted is gained. The statute made at Marlborough in 1267, commonly called the Statute of Marlbridge, chiefly consists of a re-enactment of certain concessions which had been obtained from the king during the revolutionary period, concessions which we know as the Provisions of Westminster of 1259¹. The grievances redressed in this instance are for the most part the grievances of the smaller landowners.

But it is not only or even chiefly by means of legislation that English law has been growing. The reign of Henry III is the time when a great part of the common law takes definite shape—in particular the land law. The king's court has been steadily at work evolving common law; that law is carried through the length and breadth of the kingdom by the itinerant justices. As yet the judges have a free hand—they can invent new remedies to meet new cases. Towards the end of the reign indeed complaints of this grow loud. It is more and more seen that to invent new remedies is in effect to make new laws; that the judges while professing to declare the law are in reality making law;—and it is more and more felt that for new laws the consent of the estates of the realm, at all events of the baronage, is necessary. But law, judge-made law if we like to call it so, has been growing apace. The justices have been learned men, mostly ecclesiastics, men not ignorant of Canon Law and Roman Law. A great law book is the outcome². Henry of Bratton, or Bracton as he is commonly called, died in 1268; for twenty years he had been a judge. Sometime between 1250 and 1260 he wrote his treatise on the Laws of England. He owed a great deal to the work of an Italian lawyer, Azo of Bologna, and we can plainly see that the study of Roman law has had a powerful

¹ Printed in Stubbs' *Select Charters*, pp. 400—5.

² Pollock and Maitland, *History of English Law*, vol. I, pp. 206—10.

influence on the growth of English law:—it has set men to think seriously and rationally of English law as a whole, to try to set it in order and represent it as an organized body of connected principles¹. But the substance of Bracton's work is English. He cites no less than 500 decisions of the king's judges. English law, we see, is already becoming what we now call 'case law'—a decided case is an 'authority' which ought to be followed when a similar case arises. We see also that the growth of English law, especially land law, has been very rapid. Glanvill's book looks very small and meagre when placed beside Bracton's full and comprehensive treatise. We may indeed regard the reign of Henry III as a golden age of judge-made law: the king's court is rapidly becoming the regular court for all causes of any great importance, except those which belong to the ecclesiastical courts, and as yet the judges are not hampered by many statutes or by the jealousy of a parliament which will neither amend the law nor suffer others to amend it. Also we now hear very little of local customs deviating from the common law; as the old local courts give way before the rising power of the king's court, so local customs give way to common law. The king's court gains in power and influence because its procedure is more summary, more rational, more modern than the procedure of the local courts. Their procedure is never improved, it remains archaic; meanwhile the royal court is introducing trial by jury; all the older modes of trial are giving way before this new mode. In 1215 the Lateran Council forbade the clergy any longer to take part in the ordeal. In England the ordeal was at once abolished, and the whole province of criminal law was thus thrown open to trial by jury.

v. *Edward the First (1272–1307).*

Edward I has been called 'the English Justinian.' The suggested comparison is not very happy; it is something like a comparison between childhood and second childhood. Justinian, we may say, did his best to give final immutable form to a system which had already seen its best days, which had

¹ *Select Passages from the Works of Bracton and Azo*, ed. F. W. Maitland (Selden Society), 1895—with a brilliant introduction.

already become too elaborate for those who lived under it. Edward, taking the whole nation into his counsels, legislated for a nation which was only just beginning to have a great legal system of its own. Still it is very natural that we should seek some form of words which will mark the fact that Edward's reign is an unique period in the history of our law. Sir M. Hale, writing late in the seventeenth century, says that more was done in the first thirteen years of that reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together. We can hardly say so much as this; still we may say that the legislative activity of those thirteen years remains unique until the reign of William IV; for anything with which we may compare Edward's statutes we must look forward from his day to the days of the Reform Bill. Now Hale, I think, hits the mark when he says that more was done *to settle and establish the distributive justice of the kingdom* in Edward's reign than in subsequent ages¹. The main characteristic of Edward's statutes is that they interfere at countless points with the ordinary course of law between subject and subject. They do more than this—many clauses of the greatest importance deal with what we should call public law—but the characteristic which makes them unique is that they enter the domain of private law and make vast changes in it. For ages after Edward's day king and parliament left private law and civil procedure, criminal law and criminal procedure, pretty much to themselves. Piles of statutes are heaped up—parliament attempts to regulate all trades and all professions, to settle what dresses men may wear, what food they may eat—ordains that they must be buried in wool—but we may turn page after page of the statute book of any century from the fourteenth to the eighteenth, both inclusive, without finding any change of note made in the law of property, or the law of contract, or the law about thefts and murders, or the law as to how property may be recovered or contracts may be enforced, or the law as to how persons accused of theft or murder may be punished. Consequently in Hale's day and in Blackstone's

¹ *The History of the Common Law of England*, 4th edn., 1779, p. 152.

day, a lawyer whose business lay with the common affairs of daily life had to keep the statutes of Edward I constantly in his mind ; a few statutes of Henry VIII, of Elizabeth, of Charles II he had to remember, but there were large tracts of past history which had not supplied one single law which was of any importance to him in the ordinary course of his business. To a certain extent this is true even now, even after the vigorous legislation of the last sixty years. There are at least two statutes of Edward I which you will have to know well—the *De donis conditionalibus* and the *Quia emptores terrarum*—these still are pillars of our land law; to pull them away without providing some substitute would be to bring the whole fabric to confusion. It is well to remember the dates of the great statutes.

1275. Stat. Westminster, I.

1278. Stat. Gloucester.

1284. Stat. of Wales.

1285. Stat. Westminster, II.

Stat. Winchester.

1290. Stat. Westminster, III.

1297. Confirmatio Cartarum, with new articles.

But Edward was not merely a great legislator, he was a great administrator also, a great organizer. Take any institution that exists at the end of the Middle Ages, any that exists in 1800—be it parliament, or privy council, or any of the courts of law—we can trace it back through a series of definite changes as far as Edward's reign, but if we go back further the object that we have had in view begins to disappear, its outlines begin to be blurred, we pass as it were from sunlight to moonlight, we cannot be certain whether that which we see is really that for which we have been looking. Shall we call this court that is sitting, the King's Bench, or the Council, or the Parliament? it seems to be all and yet to be none of these. In Edward's day all becomes definite—there is the Parliament of the three estates, there is the King's Council, there are the well known courts of law. Words have become appropriated—the king in parliament can make statutes; the king in council can make ordinances; a statute

is one thing, an ordinance is another. It is for this reason that any one who would study the constitution of older times, should first make certain that he knows the constitution as it is under Edward I.

The vigorous legislation of the time has an important consequence in checking the growth of unenacted law. Henceforward the common law grows much more slowly than under Henry III. Its growth is hampered at every turn by statute—the judges are checked by the now admitted principle that changes in the law are not to be made without the consent of parliament. Law continues to grow, but it can grow but slowly; the judges are forced to have recourse to fictions and evasions because the highroad of judge-made law has been barred. Two law books come to us from Edward's reign, Britton and Fleta, both written in 1290 or thereabouts; Britton in French, Fleta in Latin; both are little better than poor epitomes of Bracton's work, epitomes which take notice of the changes introduced by the great statutes. We learn from them an important fact:—it is plain that English lawyers are no longer studying Roman law. There can be no doubt that under Henry III Roman law was slowly gaining ground in England. To any further Romanization of English law, a stop was put by Edward's legislation. The whole field of law was now so much covered by statute, that the study of Roman law had become useless. About the same time, we no longer find ecclesiastics sitting in the royal courts; Bracton was an ecclesiastic, an archdeacon, and the great judges whose decisions he cites were ecclesiastics—Martin Pateshull became Dean of St Paul's, William Raleigh became Bishop of Winchester. But the opinion steadily grew among the clergy that ecclesiastics should not sit in lay tribunals. The consequence is that from the beginning of Edward's reign, English law becomes always more insular, and English lawyers become more and more utterly ignorant of any law but their own. Thus English law was saved from Romanism; by this we lost much—but we gained much also. The loss, we may say, was juristic; if our lawyers had known more of Roman law, our law—in particular our land law—would never have become the unprincipled labyrinth that it became;—the gain, we

may say, was constitutional, was political :—Roman law here as elsewhere would sooner or later have brought absolutism in its train. It should be added that the rapid growth of the common law under Henry III was connected both as cause and as effect with the growth of a large class of English lawyers. From the beginning of Edward's reign, it is a large and a powerful class—and it is from among the members of this class that the king chooses his judges. And now a new form of legal literature appears. From 1292 we get our first law report—the first of the Year Books. The Year Books are reports of discussions which took place in court—of the arguments of counsel and the opinions of the judges. The series extends from Edward I to Henry VIII. Together with the text-books of Glanvill, Bracton, Britton and Fleta, they are the great source of all our information as to the common law and not only are they a source of information, but the cases reported in them were regarded as authorities—indeed they are so regarded even at the present day—if an occasion arises upon which they could be appropriately cited :—but this of course seldom happens, for the whole field of common law is pretty well covered by much more modern authorities. Still we note that from the middle of the thirteenth century our common law has been case law, that from 1292 onwards we have law reports, that from 1194 onwards we have plea-rolls¹.

This term common law, which we have been using, needs some explanation. I think that it comes into use in or shortly after the reign of Edward the First. The word 'common' of course is not opposed to 'uncommon': rather it means 'general,' and the contrast to common law is special law. Common law is in the first place unenacted law; thus it is distinguished from statutes and ordinances. In the second place, it is common to the whole land; thus it is distinguished from local customs. In the third place, it is the law of the temporal courts; thus it is distinguished from ecclesiastical

¹ Five volumes of the Year Books of Edward I, and thirteen volumes of the Year Books of Edward III, are published in the Rolls Series. The Selden Society has undertaken the publication of the Year Books of Edward II. The first three volumes, edited by Maitland, have already appeared, with introductions of the greatest interest and importance.

law, the law of the Courts Christian, courts which throughout the Middle Ages take cognisance of many matters which we should consider temporal matters—in particular marriages and testaments. Common law is in theory traditional law—that which has always been law and still is law, in so far as it has not been overridden by statute or ordinance. In older ages, while the local courts were still powerful, law was really preserved by oral tradition among the free men who sat as judges in these courts. In the twelfth and thirteenth century as the king's court throws open its doors wider and wider for more and more business, the knowledge of the law becomes more and more the possession of a learned class of professional lawyers, in particular of the king's justices. Already in John's reign they claim to be *juris periti*. More and more common law is gradually evolved as ever new cases arise; but the judges are not conceived as making new law—they have no right or power to do that—rather they are but declaring what has always been law.

B. *The Land-System.*

It may seem strange that we begin our survey of public law by examining the system of landed property, for proprietary rights we may say are clearly a topic of private law. That is true in our own day, though even now it is impossible for us fully to understand our modern public law unless we know something of our law of property:—for instance the right to vote in elections for members of Parliament is clearly a right given by public law, but directly we ask, Who have this right?—we have to speak of freeholders, copyholders, leaseholders and so forth, to use terms which have no meaning to those who do not know some little of our law of landed property. But if this be true of our own day, it is far truer of the Middle Ages. What is meant by the word 'feudalism' we shall understand more fully hereafter—but here we may describe 'feudalism' as a state of society in which all or a great part of public rights and duties are inextricably interwoven with the tenure of land, in which the whole governmental

system—financial, military, judicial—is part of the law of private property. I do not mean that feudalism so complete as this is ever found—much less that we find it in England,—we shall see that in this country the feudal movement was checked at an early date:—but still it is utterly impossible to speak of our medieval constitution except in terms of our medieval land law. Let us then briefly survey the land law of Edward I's time—briefly, and having regard to its public importance; when you come to study real property law you will have to examine the same system more closely and from another point of view¹.

We must start with this:—All land is held of the king. The person who has the right to live on the land and to cultivate it, is a tenant. He holds that land of some one who is his lord. If that some one be the king, then the tenant is one of the king's tenants in chief, or tenants in capite. But between the tenant and the king there may stand many persons; A may hold the land of B, who holds of C, who holds of D, and so forth until we come to Z who holds immediately of the king, who is one of the king's tenants in capite. Each of the persons who stands between A and the king is a mesne, i.e. intermediate, lord; as regards those who stand below him he is lord, as regards those who stand above him he is tenant. Thus take a short series; A holds of B and B holds of the king; here B is lord of A, but tenant of the king.

Such is the actual arrangement. With it is connected the theory that at some past time all lands were the king's to do what he liked with. He gave land to Z (one of his great barons) and his heirs in return for certain services, Z then gave part of it to Y, Y to X, and so on until we come to the lowest tenant, to A who now has the right to enjoy the land and take the fruits thereof. This process of creating new tenancies is called subinfeudation. At the moment at which we have placed ourselves, that of Edward's death in 1307, a new measure has very lately been taken to put a stop to this process,—the statute *Quia emptores terrarum* passed in 1290:

¹ The subject of this section is treated with greater fullness in the *History of English Law*, vol. I, pp. 229—406.

more of this hereafter. In passing let us warn ourselves not to accept this legal theory that there was a time when all land was the king's to do what he liked with as describing a historical truth; at present we note that it has become the theory. No one therefore, save the king, has land that he does not hold of some one else—every other person has some superior, some lord: the formula is *tenet terram illam de B.*

Now in every case the tenant in respect of the land owes some service to the lord—this in theory is the return he makes to his lord for the land—he holds by some tenure (*tenura*) by some mode of holding. Gradually these tenures have been classified:—we may reckon six tenures, (1) frankalmoign, (2) knight service, (3) grand serjeanty, (4) petty serjeanty, (5) free socage, (6) villeinage.

(1) I mention frankalmoign first; it can be very briefly dismissed, but is instructive as showing how far the theory of tenure has been pressed. Sometimes religious bodies and religious persons, monasteries, bishops, parsons, hold land for which they do no earthly service to the lord. They are said to hold by way of free alms, free charity, *per liberam elemosynam*, in frankalmoign. The theory of tenure however is saved by the doctrine that they owe spiritual service, that they are bound to pray for the soul of the donor who has given them this land, and this duty can be enforced by spiritual censures in the ecclesiastical courts. Do not think that a monastery or a bishop can hold by no other than this easy tenure; on the contrary, though a large part of England is held by ecclesiastics, tenure in frankalmoign is somewhat exceptional—the ecclesiastics often hold by military service.

(2) By far the greater part of England is held of the king by military service, by knight service; in some way or another it has come to be mapped out in knight's fees. We cannot say that a particular acreage of land or land of a particular value constitutes a knight's fee (*feodum militis*); but it seems as if there had been a vague theory that a knight's fee should normally be worth £20 a year or thereabouts. But in Edward's day we can say, that whether owing to some general rule or to bargains made in each particular case, it has become settled

that this particular territory owes the service of one knight, that it is *feodum militis*, while another has not been split into single knight's fees but owes altogether the service of five or of ten knights.

The service due from a single knight's fee is that of one fully armed horseman to serve in the king's army for 40 days in the year in time of war. We notice however that there has been constant quarrelling between king and barons as to the definition of this service. Can the tenant be forced to serve in foreign parts? As a matter of fact they have done so: but in 1213 they refused to follow John to France and so forced on the grant of the Charter, and very lately, in 1297, they have refused to follow Edward to France and so forced on the confirmation of the Charter. That they are obliged to serve against the Scots and the Welsh is not doubted.

The tenant by knight's service, whether he holds of the king or of some mesne lord must do homage to his lord and must swear fealty. The act of homage is this—the tenant kneels before his lord and holds his hands between the hands of his lord, and says, 'I become your man from this day forward of life and limb and of earthly worship, and unto you shall be true and faithful and bear to you faith for the tenements that I hold of you'—then, if the lord be not the king, he adds these noteworthy words, 'saving the faith that I owe to the king.' Then the lord kisses his man. Fealty is sworn thus, with hand on book, 'Hear this my lord that I shall be faithful and true unto you and faith to you shall bear for the lands that I hold of you, and that I shall lawfully do to you the customs and services which I ought to do, so help me God and his saints.' The act of homage constitutes an extremely sacred bond between lord and man—the bond of fealty is not so close—and an oath of fealty must be sworn in many cases in which homage need not be done. The nature of these bonds we shall consider at large by and by—happily for England they became rather moral than legal bonds.

As a consequence of holding by knight's service the tenant is subject to many burdens which we know as the incidents of military tenure: it is usual to reckon seven; each of them has its own history.

(a) Aids. There has been a doctrine of vague extent that the lord can legitimately demand aid (*auxilium*) from his tenant when he is in need of money. The aid has been considered as a free-will offering, but one which ought not to be refused when the demand is reasonable. Gradually the demand has been limited by law. In the charter of 1215 John was compelled to promise that he would exact no aid without the common counsel of the realm save in three cases, namely in order to make his eldest son a knight, in order to marry his eldest daughter, and in order to redeem his body from captivity and then only a reasonable aid. The same restriction was placed upon the mesne lords. These clauses however were omitted from a charter of 1216. In 1297 however Edward I was obliged to promise that he would take no aids save by the common consent of the realm, saving the ancient aids. In 1275 (St. West. I. c. 36) the amount of aid for knighting the lord's son or marrying his daughter was fixed at 20 shillings for the knight's fee, and the same sum for every estate in socage of £20 annual value.

(b) If the tenant in knight service having an inheritable estate died leaving an heir of full age, that heir owed a relief for his land—*relevium*—a sum due on his taking up the fallen inheritance—*relevat hereditatem*. This has been a sore point of contention between the king and his barons, between them and their vassals ;—the lord has been in the habit of getting what he can on such an occasion, even of forcing the heir to buy the land at nearly its full price. Gradually the law has become more definite. The relief for the knight's fee is 100 shillings, but the holder of a barony (a term to be explained hereafter) pays £100; the socager pays one year's rent. This was already the law of Glanvill's time; it was confirmed by the charter (1215, c. 2).

But (c) the lords have contended for a certain or uncertain right of holding the land of the dead tenant until the heir shall offer homage and pay relief :—this right is that of taking the first seisin after the tenant's death, the right of primer seisin. In this case law has gone against the lords; it is established by the Statute of Marlborough (1267, c. 16) that the lord may not seize the land, he may but make a formal

entry upon it in order to preserve evidence of his lordship. Law, however, has not had the same measure for the king as for other lords—the king has a right of primer seisin—he may keep the heir of his tenant out for a year—or what comes to the same thing, he can in addition to the relief extort one year's profit of the land.

(*d*) On the other hand there are rights of the lord which have steadily grown and which the law has now sanctioned. If the heir of the military tenant is under the age of twenty-one, being male, or fourteen, being female, the lord is entitled to wardship—to wardship of the body of his tenant, to wardship of the land also. This means that he can enjoy the lands for his own profit until the boy attains twenty-one or the girl fourteen. He is bound to maintain the child and he must not commit waste, but within these limits he may do what he likes with the land and take the profits to his own use—and this profitable right is a vendible commodity: wardships are freely bought and sold. Here again we find that the king has peculiar rights—prerogative rights they are called. Generally, if the child holds of two lords, each lord gets the wardship of those lands that are holden of him; but if one lord be the king, then he gets a wardship of all the lands, of whomsoever they be holden.

(*e*) Connected with the right of wardship is the right of marriage. This we can see has steadily grown as we trace it from the charter of Henry I to the charters of John and Henry III and the Statute of Merton (1236). It comes to this, that the lord can dispose of the ward's marriage, can sell his ward in marriage. The only limit to this is that the match must be an equal one; the ward is not to be disparaged, married to one who is not his or her peer. At first apparently all that the lord claims is that his female tenant shall not marry without his consent—a demand which is reasonable enough while the military tenures are great realities:—my female tenant must not carry the land which she holds of me to a husband who is my enemy. But the right has grown far beyond this reason:—it is now extended to males as well as females, and the marriage of every ward is a vendible commodity.

(f) Fines on alienation. Here the law has on the whole taken the side of the tenant. We can produce no text of English law which says that the leave of the lord is necessary to an alienation by the tenant. The tenant cannot indeed compel his lord to accept a new tenant in his place; but he can create a new tenancy; B holds of A, B can give the land to C to hold of him, B. We do not find it laid down that the consent of A was necessary for this; the royal judges, like all lawyers, seem to have favoured free alienation:—but we do find that the consent of the lords is commonly asked, and we do find that the view taken by the lords is that their consent is necessary. This is a battle-field during the thirteenth century; the greater lords are opposed to free alienation, the tenants wish for it; the royal judges take the side of the tenants, except against the king. In 1290 a definite settlement is arrived at by the famous *Quia emptores terrarum*. That statute you must some day study as part of our existing law of real property. What it does is roughly speaking this, it concedes free alienation to all except the king's tenants in chief; on the other hand it puts a final stop to the process of subinfeudation; B holds of A, B wants to sell his land to C—he wants to convey it to C and his heirs; he can do so without A's consent, but C is not to hold of B, he is to hold of A. A tenant may substitute another person in his place—but the creation of a new tenure is impossible—or rather, I must be exact though the words may be unintelligible to you—the creation of a new tenure in fee simple is impossible. The liberty of alienation however is not yet conceded to the king's tenants in chief; the law has one measure for the king another for other lords. If one of the tenants in capite alienates without the king's consent, this is a forfeiture of the land; it is Edward the Third's day before this severity was relaxed and a fine of one-third of the yearly value of the land took the place of the forfeiture.

(g) Escheat. If the tenant died without an heir the land escheated, that is, fell back to the lord—it became his to do what he pleased with. As you have been hitherto reading more Roman than English law, I had better say that the English heir was and is to this day a very different person

from the Roman *haeres*. Before the Conquest the church had introduced the testament or last will, and lands or at all events some lands as well as goods could be given by will. But at the Conquest the will of lands disappears. The maxim is laid down in Glanvill—Only God can make an heir, not man. The English heir therefore never succeeds under a will. This is so even at the present day, though since the Restoration, 1660, lands have been freely alienable by will. To this day the heir is a person who succeeds on an intestacy—he who takes land under a will is a devisee: but at the time of which we are speaking, Edward I's day, the will of lands was still in the distant future. But a failure of heirs is not the only cause for an escheat, if the tenant commits any of those grave crimes that are known as felonies—there is an escheat; he loses the land, no heir of his can succeed him, the lord takes the land for good and all.

Such in brief were the incidents of tenure by knight's service.

(3) Grand serjeanty (*magna serjeantia*) differed but little from this. The tenant instead of being bound to serve as a knight for forty days in the wars, was bound to do some peculiar service for the king—to carry his banner, or his sword, to lead the vanguard or the rear guard, to be his champion, the constable or marshall of his army, or the like. In almost all respects this tenure had all those incidents which we have just described.

(4) Tenure in petty serjeanty came in after-time to be regarded as but a variation of tenure in socage. Its characteristic was the obligation to provide the king with warlike implements, a sword, a lance, or the like. It maintains its place in the catalogue of tenures merely because it was but slowly that the line was drawn between petty serjeanty and grand serjeanty. It was established by Magna Carta that where the service though of a warlike nature consisted merely in providing weapons, and not in fighting—then wardship and marriage were not due—hence a line was drawn between the grand serjeanties which in all important respects were like knight service—and the petty serjeanties which were almost the same as socage¹.

¹ For Maitland's later views on serjeanties see *History of English Law*, vol. 1, pp. 282—90. 'The central notion seems what we may call servanthip...the tenant by serjeanty is steward, marshal, constable, chamberlain, usher, cook, forester, falconer, dog-keeper, messenger, esquire; he is more or less of a menial servant.'

(5) Postponing to a more convenient season the etymology of the term socage, we find that tenure in free socage is a tenure by some fixed service which is not military: that is not the full explanation, but will serve for the present. The service of the socager generally consists of a rent payable either in money or in agricultural produce; very often he is also bound to do a certain amount of ploughing for his lord—to plough three days a year or the like:—this is so common that lawyers already believe, what is not historically true, that the term socage is connected with the word sock, which means a ploughshare. Now socage tenure involved some, but not all, of those burdens of which we have lately spoken—the socager swore the oath of fealty, though he did not usually do homage; he had to pay the three aids—the aid for knighting the lord's son, marrying the lord's daughter, redeeming the lord from captivity—in the first two of these cases he paid 20 shillings for land of the annual value of £20; by way of relief he paid one year's rent; if he held of the king in chief, the king was entitled to a primer seisin; if he held of the king in chief he could not alienate without license; his land escheated to the lord if he died without an heir or committed felony. On the other hand socage tenure did not involve the two worst burdens of feudalism; the wardship and marriage of the socager's heir did not belong to the lord. If he left an heir under fourteen the next relative to whom the land could not descend was guardian, but when the heir attained fourteen (that was full age as regards socage) the guardian had to account to him for the profits of the land.

We must not be led into speaking as though the distinctions between these various kinds of tenures were distinctions between various kinds of lands. The self-same piece of land might at one and the same time be held by knight service or by socage. For instance A has held of the king by military service, but he has enfeoffed B to hold of him in socage; the military service due from A to the king is a burden on the land; if A will not perform it, then a distress can be made on the land and B's goods may be taken; but as between A and B, it is A not B who is bound to do the service, or to pay the scutage; A must indemnify B, if the king compels B to pay

the scutage; as between A and B, B is only bound to pay the fixed rent, to do the ploughing or the like. By far the greater part of the lands of England are, I take it, held of the king by military service; to find land held immediately of the king by socage tenure is comparatively rare, but there seem to be considerable tracts which are held of the king by frank-almoign. The greater part of England therefore is held by military service, but then a great part of this is held by socage—the tenants in chief hold by knight's service, but many of their sub-tenants hold by socage. Such is the state of things in Edward's day; but as we have lately seen, in 1290 a stop was put to the process of subinfeudation—a new tenure of an estate in fee simple can no longer be created—no new rungs can be put into the feudal ladder. How far the process had really gone, it is difficult to say, but I think that pretty often the lords and tenants stood three or four deep—we may pretty often find that D holds of C who holds of B who holds of A who holds of the king. By means of subinfeudation free socage has become a far commoner tenure than it was in the twelfth century; the lords have found it profitable to grant out their lands in return for fixed rents.

One other remark of great importance must be made—military service is due to none but the king; this it is which makes English feudalism a very different thing from French feudalism. Suppose that A, a great lord, held 10 knight's fees of the king, he might grant one of these to B and stipulate that B should do the military service due from that fee: B then will hold of A by military service; if B neglects to do the service, then A has legal means of redress: B is bound to A to do the service; still the service is due not to A, but to the king; it is service to be done for the king in the national army; it is not service to be done for A in A's quarrels. This makes English feudalism a very different thing from continental feudalism: elsewhere we may find the tenant bound to fight for his lord in his lord's quarrels, bound even to fight for his immediate lord against that lord's lord; here in England, however strong may be the feeling that this ought to be so, that the man is bound to espouse his lord's quarrels, still that feeling is not represented by law—rather it is

repressed by law :—the only quarrel in which any one is bound to fight is the king's quarrel, the only force in which any one is bound to serve is the king's force ; our kings have been powerful enough to bring about this very desirable result.

(6) Villeinage. A very large part of England, by whatever tenure it may be holden of the king, is ultimately held in villeinage. The word *villenagium* is used in what seems to us a confusing way to cover two different things, first a personal status and secondly a tenure. There is a very large class of persons who are personally unfree. The technical term whereby they are described is *nativi*, which means born serfs or bondsmen—thus A is the *nativus* of B ; but not unfrequently they are spoken of as *servi* and as *villani*. They are unfree, but we must not call them slaves ; they are not rightless ; the law does not treat them as things, it treats them as persons ; still they are unfree ; they must not leave their lord's land ; if they do he may recapture them and bring them back ; the law will aid him in this ; it gives him an action for recovering the body of his *nativus*, an action *de nativo habendo*. Generally, if not always, the *nativus* has land which he holds in villeinage, which he holds by villein services. He has land, but how far he can be said to have a right in this land is a difficult question. One thing is clear—the king's courts do not protect that right against his lord. If the lord capriciously chooses to eject him, he has no remedy against his lord in the king's courts. We find however that he is conceived to hold his land by perfectly definite services and that this is not merely the theory of the villeins, but the theory of the lords also. This we learn from the surveys which religious houses made of their manors. In such surveys we find thousands of entries of this kind—A.B. holds a virgate of land ; for this he is bound to do certain services, e.g. he is bound to work three days a week on the lord's land, and five days a week in autumn ; what is to be deemed a day's work is often minutely defined—thus, if he be set to thrash, he must thrash such and such a quantity ; if he be set to ditch, he must ditch so many yards in a day—in general everything is very definitely expressed. How far he can be said to be protected in his holding so long as he does these his due

services is a question which we cannot raise without first speaking of the manorial courts; but as already said, the king's courts give him no protection against his lord. Then very generally we find it said that he is prohibited from selling his ox or his horse without the lord's leave, also that he may not give his daughter in marriage without the lord's leave, or at all events may not give her in marriage outside the manor; in many cases however the sum that he must pay for the lord's license is a fixed sum. The king's courts however do not protect his movable goods against his lord, any more than they protect his land against his lord: the lord may at any time seize the chattels of his *nativi*. Again the lord may imprison the body of his *nativus*; the king's courts give no redress; but against maiming and death at the lord's hand they give protection; the life and limb of every man, be he free or unfree, are in the king's protection; to slay or to maim him is a felony. Also it is becoming more and more the theory and the fact that the king's courts will protect the *nativus*, his body, his goods, and his lands against every one except his lord. The status of the *nativus* is coming to be more and more regarded as a mere relationship between him and his lord, a relationship which in no wise concerns third persons, less and less as a status thrust upon the *nativus* by public law which stamps him as a person who has but imperfect rights.

But again, we find that a man may well hold land in villeinage and yet be no *nativus*. He is a free man, he may leave the land if he pleases, he cannot be captured and brought back, his chattels are fully his own, the lord may not seize them. Bracton often puts it thus: '*tenementum non mutat statum*'—the tenure of villeinage is different from the status of villeinage—this man holds land in villeinage, but personally he is no villein. However such a tenant in villeinage has as yet no right in the land which the royal courts will protect against the lord. Their doctrine is that the land is the lord's land, that the tenant is merely a tenant at the lord's will, whom the lord can at any time eject. On the other hand, as already said, we find it conceived, even by the lords themselves, that their *tenentes in villenagio*, even

their *nativi*, held by perfectly definite services—so many day's work per week, ploughings, harrowings, reapings and so forth to be done on the lord's own demesne lands. We find too that these *tenentes in villenagio* do in fact alienate their lands; they cannot do this without the lord's license; they yield up, surrender the land into the lord's hand, who then grants it to the new tenant. We find also that at least in some cases the tenant's rights are considered as inheritable; thus we find it said in the manorial surveys that the heir of the tenant in villeinage must pay this or that sum to the lord for leave to enter on his ancestor's land. How far such a tenant can be said to have any legal right in his land as against his lord we cannot decide at present; he certainly seems to be conceived as having what we should call a moral right; but the first thing to understand is that he has no right in the land as against his lord that is protected by the royal courts. This is so in the days of Edward the First and for a long century afterwards¹.

It now becomes possible to fix the meaning of a term that we shall have often to use, viz. a *freholder*. Ever since the days of Henry the Second the king's own courts have afforded protection to both the possession and the property which any one has in a *liberum tenementum*. Gradually a great mass of law has been developed as to the meaning of this term. In the first place it excludes the tenants in villeinage—*liberum tenementum* is contrasted with *villanum tenementum*. If a person holds in frankalmoign, by knight's service, by grand or petty serjeanty, or in free socage, he has a freehold, and is a freeholder; not so he who holds in villeinage. What exactly was the test which originally distinguished free socage from villeinage, it is now very difficult to see. Any uncertainty in the agricultural service seems to have been enough to stamp the tenure as villein². The tenant in free socage was often bound to do a certain amount of ploughing on the lord's land; but generally he owed no week work, was not bound to work for the lord so many days in every week as the tenant in villeinage commonly was. When once the line was drawn,

¹ For an elaborate discussion on the status of the villein, *History of English Law*, vol. I, pp. 412—32.

² The test of villeinage is discussed by Vinogradoff, *Economic Journal*, vol. x (1901), p. 308 ff.

however, it was of the utmost importance ; once decided that the tenure was freehold, it was perfectly protected in the king's own court ; once decided that it was villein tenure, then the king's courts treated it as though it were merely a tenancy at the lord's will. *Villanum tenementum* is thus the first contrast to *liberum tenementum*.

But the evolution of new forms of landholding provided a new contrast. Since the Norman Conquest a practice had grown up of letting land for terms of years, in general short terms. The lessee, 'the termor,' who had such a lease was at first considered as having no right in the land, no real right, as we should say no right *in rem*. He had merely a personal right good against his lessor—his lessor had contracted that he, paying his rent, should enjoy the land for a term of years ; on that contract he had an action against his lessor. If a stranger ejected him, he had no action against that stranger ; the lessor might sue the stranger for entering *his* (the lessor's) land ; but the lessee had only an action on the contract against his lord. While such was the case the lessee was not conceived to have *liberum tenementum*, he had no *tenementum* at all ; he had but a right *in personam* ; he was no freeholder. The word freeholder therefore excluded not only the tenant in villeinage, but also the termor, the person who had a right to enjoy land limited to some fixed term of years. Before the reign of Edward the First, the situation had been greatly changed ; the king's court had by degrees given a large, though not as yet a complete, measure of protection to the termor against the world at large : it had in fact turned the *jus in personam* into a *jus in rem*. Nevertheless the old nomenclature with its important political consequences was still maintained—the termor was no freeholder, he had no place in the county court, and therefore no vote in the election of knights of the shire—no, not until 1832. A freeholder must hold land at least for the life of himself or of some other person. He may have, as the phrase goes, a greater estate than this, he may have an inheritable estate, one which will descend to his heirs, or to a limited class of heirs, the heirs of his body—but this at least he must have. He who holds for a fixed term of years however long, a thousand years or more, is no freeholder.

The distinction gets emphasized in another way. Whatever may have been the law or various local customs of inheritance which prevailed here before the Conquest, we may be fairly certain that primogeniture was unknown; that if a man left several sons, his whole property, land and chattels, were *as a general rule* divided among them all—though it is very probable that land, especially land held on servile conditions, often went to the youngest son. Primogeniture creeps in with the Conquest: very gradually a set of rules of inheritance giving the whole land to the eldest male whenever there are males of equal degree was elaborated, and very slowly it was extended from the lands of military tenants to other lands: that the land of the military tenant should not be divisible is very intelligible. Before the end of Edward the First's reign the primogenitary rules had been extended to socage tenure—this had been a slow process, but gradually it had become established that he who contended that the inheritance should be divided among all males of equal degree had to prove his case. Other systems endured merely as local customs: in Kent the inheritance was still heritable among sons, and very commonly a tenement held in villeinage descended to the youngest son¹. But the gradual introduction of primogeniture, together with the principle that lands could not be left by will and the activity of the ecclesiastical courts combined to set a deep gulf between what came to be called real and what came to be called personal property. An explanation of these two terms would take us too far afield—but seize this principle, that for freehold and for chattels there came to be two distinct systems of succession. The freehold (with which no ecclesiastical court may meddle) descends to the heir, and only by force of some local custom can it be the subject of a last will. The chattels can be left by will; of all testamentary matters the ecclesiastical courts have cognizance; if there is an intestacy the heir does not get the chattels; they are distributed by the ecclesiastical courts. But further the term of years, the right of a lessee to whom land has been let for a term of years, is for this purpose a chattel; it is assim-

¹ For the custom of Borough English, as it was called, see *History of English Law*, vol. I, p. 647, and vol. II, pp. 279—80.

lated to movable goods; it is a new creation, and the ecclesiastical courts have successfully asserted that it can be disposed of by will—the term of years is a chattel and personal property. All this you will of course have to study much more thoroughly hereafter. The distinction between real and personal property is still an elementary distinction of profound importance at the present day. But it was necessary to say some little about it, for the word freeholder must be constantly in our mouths.

In the Middle Ages land law is the basis of all public law. You will already have observed how the system of tenure provides the king with an army and with a revenue—men owe military service by reason of tenure, they pay aids, reliefs, scutages by reason of tenure, by reason of tenure the king gets profitable wardships, and marriages, and escheats—he is the supreme and ultimate landlord. But the influence of tenure does not stop here; the judicial system is influenced by tenure, the parliamentary system is influenced by tenure. Every lord claims a right to hold a court of and for his tenants. This is an important principle, but we can hardly speak of its working until we have spoken of the courts older than feudalism—the courts of the shire and the hundred which continue to exist during the feudal period.

Now if we suppose a quite perfect feudal arrangement, then all courts, all judicial and governmental organization, should be determined by tenure. The king as highest landlord should have a court of his tenants in chief; they would sit as judges therein, and they again would be the king's advisers; it would be with their counsel and consent that the king would impose taxes and make laws. Then again each of these tenants in chief would have his court of sub-vassals, who again would have their courts. Further the sole connection between the king and these sub-vassals would be a mediate connection, only through their lord would he control them. C who held of B who held of A who held of the king would not be the king's man or have any place in a court or assembly over which the king presided; he would not even be A's man; he would never meet or sit along with A's tenants on a footing of legal equality; he would owe no fealty or homage to any one

but his immediate lord, namely, B. This ideal of a perfectly feudalized society was pretty fully realized in France; no immediate bond bound the vassals of the Duke of Normandy to the king of the French; they were bound to the Duke, and the Duke to the king. Happily this ideal is but very imperfectly realized in England, this we must constantly notice; but we ought carefully to keep this ideal in mind, for there have been powerful forces making for its realization and they have had to be met not only by laws, but also by the sword.

C. *Divisions of the Realm and Local Government.*

(i) England is divided into counties or shires. For the most part these units are already of very ancient date; though some of the Northern counties, in particular Lancashire, have been formed since the Norman Conquest. Already in Edward's day the arrangement is in most respects that which at present exists. Many, perhaps most, of these divisions are in their origin not divisions into which a kingdom of England has been carved, but are units which once were independent states but have coalesced to form the kingdom of England; Kent, Sussex, Essex, Middlesex, Surrey have had kings of their own; Norfolk and Suffolk are the settlements of North Folk and South Folk. As these old states by conquest fall together into one great state, some part of their primitive organization is left to them; to use a modern phrase, they are mediatized; in some cases the old dynasty of kings became for a while a dynasty of under-kings, *sub-reguli*. In other cases the shire may have been a division carved out of a larger whole, and organized on the model of one of these mediatized kingdoms. At any rate before the Norman Conquest each shire had its shire moot, which was a court of justice and to some extent also a governmental assembly for the shire. In it the ealdorman had presided. The ealdorman had been a national officer appointed by the king and the national assembly. The title ealdorman had, however, been giving way to that of eorl, and the office had been tending to become a hereditary office.

Every shire had by no means necessarily an ealdorman or eorl to itself; Canute had divided the kingdom into four great earldoms; but down to the time of the Conquest, this officer had been the chief man of every shire that lay within its territory, the president of its court, the leader of its forces. He received a third part of the profits arising from the shire moot, the third penny of the county, as it was afterwards called. Along with the ealdorman in the shire moot, the bishop had sat; it was not until after the Norman Conquest that a firm line was drawn between temporal and ecclesiastical causes, the two had been heard together in the ancient courts. But from a very remote period, the shire had had another officer, namely the shire reeve, or as we say, sheriff. He seems from the first to have been a royal officer, appointed by the king, and representing the royal authority. The ealdorman seems to have been considered as a national leader, the sheriff as a royal steward or bailiff, chiefly concerned with the protection of the king's interests. The shire moot had seemingly been held but twice in the year. There seems little doubt that originally every freeman of the shire had been entitled and bound to attend it, but long before the Norman Conquest this right and duty seems to have been confined to the free land-owners. The process whereby land-owning had taken the place of personal freedom as a political qualification will come before us hereafter, but we had better at once make a remark which is necessary if we are to understand medieval history. The right of attending courts and assemblies was not a coveted right; we must think of it rather as a burdensome duty, a duty which men will evade if they possibly can. We see the class of landless freemen getting gradually excluded from all participation in public business; but where we are apt to see a disfranchising process, a deprivation of political rights, they saw only a relief from public burdens, the burden of attending court or being fined for non-attendance.

Now the Norman Conquest had not destroyed the shire or the shire moot. There was a change of names. The French district which seemed most analogous to the English shire was the *comitatus*, the county, the district which had been

subject to the *comes* or count, and so the English shire became a county. And the earl became in Latin documents, the *comes*. But this title or dignity was but seldom conferred by William or by his sons, and the earl of Norman times has about him but little of the character of a public officer or the ruler of a province. The dignity was hereditary, though the heir did not acquire full possession of it until he was invested by the king, until he was girt with the sword of the county. He like his English predecessor was entitled to the third penny of the county; but for the rest he seems from the Conquest onwards to be rather a great nobleman, who usually holds large lands in the shire, than a public officer. To this the palatine earldoms are exceptions. The earl of Chester becomes almost a sovereign prince, so does the bishop of Durham; but on the whole the Norman kings seem to have seen the danger of allowing official power and jurisdiction to become hereditary in the houses of the great feudatories:—it was not by means of earls, but by means of sheriffs, that they will govern the counties. After the Conquest, that ancient officer, the sheriff, becomes in Latin documents the *vicecomes*, the vice-count; that was the continental title which seemed best suited to describe him; but this must not induce us to think of him as one who derives his power from the earl, or who in any way represents the earl: from first to last the sheriff is distinctively a royal official, a representative of kingly power—and as the Norman Conquest greatly increased the kingly power, so it greatly increased the power of the sheriff. Even here the tendency, so marked in the Middle Ages, of every office to become hereditary, to become property, was felt, and just in a very few cases the shrievalty did become hereditary; but on the whole the kings succeeded well in maintaining their hold over the sheriffs, in treating them simply as their officers and representatives. The sheriffs held their offices at the king's will. In 1170 Henry II dismissed all the sheriffs of England and put others in their stead. The sheriff had in truth become a provincial viceroy; all the affairs of the shire—fiscal, military, governmental, its justice and police—were under his control, and he was the president of the county court.

For the Conquest had not destroyed the shire moot. It became the county court. The Norman kings seem to have seen its value as a counterpoise to feudalism. To a certain extent the feudal principle that all public rights and duties are connected with land holding had, even before the Conquest, modified the constitution of the ancient assembly, it had become an assembly of free land-owners. After the Conquest the qualification became more definite; the freeholder was entitled and was bound to be present. But a court formed by all the freeholders of a shire is not, you will see, a court formed upon feudal lines. In such an assembly the tenants in chief of the crown have to meet their own vassals on a footing of legal equality; a tenant may find himself sitting as the peer of his own lord. This retention of the old courts is of vast importance in the history of parliament. In Henry I's day the county court was held, as in the days of the Confessor, twice a year. More frequent assemblies seem to have become necessary. By the charter of 1217, it is ordered that the county court shall not meet more often than once a month; monthly sessions seem to have been common.

For a long time after the Conquest the county court remained what it was before the Conquest, the great ordinary court of litigation for all the men of the shire. The growth of the feudal courts (of which hereafter) had to some extent diverted business from it; on the other hand, the king used it as a check on the feudal courts. At the petition of a suitor suggesting that he could not get justice from the lord's court, the king would direct the sheriff to intervene and remove the case into the county court. Gradually, however, the county court began to lose its importance as a judicial tribunal. This was due, however, not to the rivalry of the feudal courts, but to the ever growing vigour of the king's own court, which began to throw open its doors to all suitors. Of this concentration of justice something has been said already and more must be said hereafter. But by the end of Edward I's reign, the king's own courts had already practically become courts of first instance for all matters of much importance. The county court had jurisdiction in personal actions (i.e.

actions in which land or rights connected with land were not claimed) up to 40 shillings, and jurisdiction in actions for land when default of justice was made in a feudal court, but in one way or another litigants could generally take their cases to the king's courts.

But while the county court was thus losing its high place as a judicial tribunal, it had been becoming the very foundation of the political constitution. When in the middle of the thirteenth century we find elected representatives called to form part of the national assembly, of a common council of the realm, or parliament, they are the representatives of the county courts. They are not the representatives of unorganized collections of men, they are the representatives, we might almost say, of corporations. The whole county is in theory represented by its court. So much is this the case that the language of the time draws no distinction between the two—the same word *comitatus* serves to describe both the county, the geographical district, and the assembly. The king in his financial necessities has treated with the counties, long before the counties were ordered to send representative knights to parliament. But the corporate nature of the county, the identity of the county and the county court is best brought out by entries on the judicial rolls, entries which enable us to see the county in the days of Richard and of John. The king's itinerant justices from time to time visit the counties; the whole county (*totus comitatus*), i.e. the body of freeholders, stands before them; it declares what the county has been doing since the last visitation; the county can give judgment; the county can give testimony; the county can be punished by fines and amercements when the county has done wrong; if the county has given false judgment, the county can be summoned to Westminster; four knights must be sent to represent it; he who has suffered by its false judgment may challenge the county to fight; and the county fights by the body of the county champion. Even the principle of election has been long growing before the day when the county is called on to elect members of parliament. In 1194, for example, coroners are first instituted; three knights and one clerk are to be

elected to keep the pleas of the crown¹. These *custodes placitorum coronae*, or coroners, are intended to act as checks on the sheriff; they are elected by the county court. There has even been a long struggle to make the sheriff an elected officer, and at Edward's death this has for a moment been a successful struggle; in 1300 he conceded the demand for elective sheriffs. This concession, however, was withdrawn very soon after his death. Of the representation of the county court in parliament, we must speak hereafter; so also of its jurisdiction as a court of justice; but we must learn to think of the county as an organized unity which has long had a common life, common rights and common duties. The idea of a corporation had not yet made its way into English law; we must wait for the fifteenth century for that; had it been otherwise, in all probability the county of the thirteenth century would have been recognized as constituting a corporation, a corporation governed by the body of freeholders in the county court.

(ii) The county or shire is divided into hundreds. The number of hundreds in a shire varies very greatly, and the size of the hundreds also is very different in different parts of England. Thus there are 5 in Leicestershire, 9 in Bedfordshire, 17 in Cambridgeshire and 63 in Kent. This division of the land into districts known as hundreds is of very ancient date—in all probability it has existed ever since the settlement of England by the German tribes. Similar divisions known as hundreds are found in various parts of the continent. It seems very probable that the German tribe was for military and judicial purposes subdivided into groups, each of 100 warriors, and that our English hundreds represent the settlements of such groups. In some parts of England, in the north-east, Yorkshire and Lincolnshire, the district is called, not a hundred, but a wapentake—this is the name both of the district and of its court or assembly, and seems

¹ The *Forma procedendi in placitis coronae regis* (*Select Charters*, p. 260) is generally regarded as the origin of the coroner's office. Dr Gross (*History of the Office of Coroner*, 1892, and *Select Cases from Coroners' Rolls*, 1896) claims to have found earlier references. Maitland was unconvinced. See *Eng. Hist. Rev.* VIII, 758, and *History of English Law*, I, 519.

to point to the time when the assembly was still a body of armed warriors, who marked their approval by clashing their weapons. The hundred court or hundred moot of the Anglo-Saxon time seems to have been the court of ordinary jurisdiction for the men of the hundred; it, like the shire court, had both civil and criminal jurisdiction; the relation of the one to the other we do not exactly know, but perhaps a suitor was not entitled to go to the shire-moot, until the hundred moot had made default in justice. It was held twelve times a year.

The Conquest did not destroy the hundred court; the freeholders of the hundred were bound to attend it and to sit in it as judges. But in the twelfth and thirteenth centuries, it gradually lost business owing to that concentration of justice in the king's courts, of which mention has already been made. Before the end of Edward's reign, its competence in personal actions like that of the county court had been restricted to cases in which less than 40 shillings was at stake. But further, even before the Conquest, many of these courts had fallen into private hands; the notion that all jurisdiction is the king's had been formed, and the kings had freely given and sold the right of holding courts. To a great landowner this right was very profitable, it enabled him to keep his tenants in hand, and we must further remember that throughout the Middle Ages jurisdiction is a source of income—the lord of a court has a right to the numerous fines and forfeitures which arise out of the doing of justice. It is probable that in the thirteenth century most of the hundred courts had come into private hands. In 1278 Edward made a vigorous attempt to recover the jurisdictions which had become proprietary; he instituted a searching inquiry *quo warranto*, by what warrant, under what title, the lords were presuming to exercise a jurisdiction which *prima facie* belonged to the king; and his justices succeeded in recovering a great deal of the jurisdiction by insisting that only under written documents or by long prescription could a subject claim any larger jurisdiction than that of the ordinary manorial courts. The ordinary manorial courts, you will understand, had grown up under the influence of feudal ideas and existed side by side with

the more ancient courts of the shire and the hundred. Also we must note that even when a hundred court had fallen into private hands, the king's officer, the sheriff, had at least generally the right to hold it twice a year for criminal cases. Twice a year it was the sheriff's turn to hold these courts, and a court so holden by him came to be known as the sheriff's tourn. When such courts as these were in private hands, they were generally called courts leet. The court baron and the customary court of the manor are the outcome of tenure; a court leet on the other hand has a certain criminal jurisdiction, jurisdiction in cases of petty offences, and it is not the outcome of tenure—it must have its origin in a royal grant, real or supposed; this doctrine Edward has succeeded in enforcing by means of his *quo warranto* inquiry¹.

In the general administration of the law, the hundred is an important unit. In particular it is important in the system of trial by jury introduced by Henry II. Each hundred is bound to present its malefactors; this is done by means of a jury of twelve. It is a responsible unit in the police system; from an early time, the hundred is bound to pursue criminals. Under the law of the Conqueror, if a man be found slain and the slayer be not produced, the hundred is fined, unless it can prove that the slain man was an Englishman; in other words, it pays a *murdrum* or murder fine unless there is a presentment of Englishry. So again in Edward's day, the hundreds have lately been put under constables bound to see that the men of the hundred have proper armour for the pursuit of malefactors and the repelling of enemies. In very early times we hear a little of a hundred's ealdor, and it is possible that he was an elected president of the county; but after the Conquest, and probably before the Conquest, he has disappeared; the sheriff appoints a serjeant or bailiff (*serviens*, *ballivus*) for each hundred, who presides over the court, unless that court be in private hands, and is bound to look after all the king's business within the hundred, the collection of taxes, fines, forfeitures and the like.

¹ For the whole subject of seigniorial jurisdiction, see *History of English Law*, vol. 1, pp. 571—94.

(iii) The lowest unit in the governmental system is the township or vill; the Latin word used to describe the geographical district is *villa*, while *villata* describes the people of the *villa* regarded as a collective whole. The township as such has no court of its own, but it has many police duties to perform. It has duties in the apprehension of criminals, and can be fined for the neglect of them. When the king's justices visit the county, every township has to come before them. For this purpose, the township is represented by its reeve (*praepositus*) and four best men (*quatuor meliores homines*), and its opinion is constantly taken as to the guilt or innocence of accused persons. We constantly read that the township of (let us say) Trumpington (*villata de Trumpington*) says that A is guilty of the death of B, or the like;—if it says what is untrue, it is liable to be amerced. The representation of the townships in the local courts we can trace back to the time of Henry I; but in all probability it is of much higher antiquity¹.

Here it becomes necessary to take account of a principle that we largely noticed when speaking of feudal tenure. The jurisdictional constitution of England would have been a much simpler matter to describe had there not grown up by the side of the ancient courts of the shire and the hundred a newer set of courts expressive of a newer principle—feudal courts expressive of the principle that every lord has a right to hold a court of and for his tenants. The obligation of attending the lord's court, the obligation of doing suit of court, is one of the incidents of feudal tenure. This principle has been slowly growing up: but seems an admitted truth in the twelfth and thirteenth centuries.

We find that very generally these feudal courts are courts of manors; indeed the legal theory of later times asserts, though as I think without warrant, that only as part of a manor could such a court exist. Of the manor then we are compelled to say a few words. We find (I am speaking of

¹ It would appear from a note in the MS that Maitland went on to speak of the Township as a fiscal unit. What he may have said on this point may be gathered from *Domesday Book and Beyond*, p. 147; and the *History of English Law*, I, pp. 560—7.

Edward I's day) that England is full of manors. We cannot indeed say that the whole land is parcelled out into manors; our law has no such theory as that all land is part of some manor. Still manors there are in plenty. The name manor, *manerium*, has seemingly meant in the first instance merely an abiding place (*manerium a manendo*); it is closely connected with *mansio*; it has been used more or less vaguely to signify a landed estate; gradually it has gained a legal significance, it has come to imply the existence of a court. Now if we take a typical *manerium* of the time, we commonly find that there is in the first place a quantity of demesne land—land, that is, which the lord of the manor has in his own hand, which is in every sense his very own. Then there are lands which are held of him by freehold tenants, who owe him services: some of them perhaps are bound to do the military service due to the king, others pay him rent in money or in kind, and perhaps are bound to aid him in his ploughing: these are free socagers. Then there are the tenants in villeinage, who owe week work and so forth, and by whose services his demesne lands are cultivated. All these lands usually lie together, and very often the manor is coterminous with the township.

For the free tenants of his manor, the lord keeps a court; generally by the terms of their tenure they are bound to attend this court at stated intervals, e.g. in every third week; they owe suit to his court, *debent sectam ad curiam manerii*. This idea seems indeed to lie at the root of the term socage, it is that of seeking or following; the socagers, *sokemanni*, are bound to seek, follow, attend the court of the lord. The general principle seems for some time past to have been admitted into English law—that if a man has freehold tenants, he may hold a court for them; he may bind them by their tenures to do suit to his court. Such a court then becomes the proper court in which to demand any of the freehold land that is holden of the manor—if I claim against you land which, as we both admit, is holden of A, then I must begin my action in A's court, if A has one. But great inroads have been made upon this system of feudal justice. The hand of Henry II has been felt. The principle just expressed has not

been abrogated, but its importance has been greatly curtailed. In one way and another it has become very possible for litigants to evade the manorial jurisdictions, to go straight to the king's court, or having just begun the action in the manor court to get it removed into the king's court by a royal writ. Still these courts exist, and in Edward's day have not yet ceased to do justice. Now such a court is constituted by the lord and his freeholders—they are the judges; he who owes suit of court is bound to go and sit there as a judge—a question relating to freehold land is decided by the peers of the tenure—the freeholder there gets the judgment of his peers, *judicium parium suorum*. In later times such a court is known as 'the court baron of the manor,' a phrase which seems at first merely to have meant the lord's court, *curia baronis*.

But then again the lord had what, at least in later times, was regarded as a distinct court for the tenants in villeinage. This was called the customary court, and the principle was established that in this court, unlike the court baron, the lord's steward was the only judge. I very much doubt whether this principle was established in the thirteenth century. Many important questions depend on this point; in particular the question how far the tenants in villeinage were protected in their holdings. If really the lord's steward was the only judge, then they were protected only by the lord's sense of justice: it was otherwise if they got the judgment of their *pares*. However you must know the orthodox theory that the lord's steward was the sole judge. It was in this so-called customary court that all transfers of the lands held in villeinage were effected:—A wishing to put B in his place, surrendered the land into the lord's hand, who admitted B as tenant; A being dead, the lord admitted B his heir. It became the practice to enrol all these proceedings; we have a few manor rolls from Henry III, a considerable number from Edward I. Copies of the entries relating to their lands were given to the tenants. Gradually, but this is not until a later day, the term tenant in villeinage gives way to tenant by copy of court roll, or copyholder; the copies of the court roll are the evidences of title that the tenant has. To look forward for a moment

in order to finish this matter:—about the middle of the fifteenth century the king's courts begin to protect the copyholder even against his lord; the services again become commuted for money payments; after the discovery of Mexico the value of money falls very rapidly, these payments become trifling; at last the copyholder is almost as complete an owner of land as is the freeholder:—but it is long indeed before the distinction ceases to be of political importance—not until 1832 does the copyholder vote for knights of the shire. The tenure still exists, a horrible nuisance as you will learn at large some day.

It should be noted that according to the orthodox legal theory of the sixteenth century and of to-day, there can be no manor without two freehold tenants, sufficient tenants, that is, to constitute a court baron. Whether this theory be of ancient date, I very much doubt; as a matter of fact, in the thirteenth century there are many *maneria*, so-called in legal documents, in which there are no tenants but tenants in villeinage.

Our kings have succeeded in asserting and maintaining the principle that the feudal jurisdiction is a purely civil jurisdiction, that the fact of tenure does not give to the lord any criminal or correctional jurisdiction over his tenants, or at least over such of them as are free men. But as a matter of fact, either by means of royal grants purchased from kings in want of money, or by means of usurpations so ancient that they can no longer be called in question, very many of the lords exercise some of that criminal and police jurisdiction which as a rule belongs to the hundred and county courts. In the language of later law books, and to use a term the origin of which is singularly obscure, they have established courts leet—courts which take cognizance of petty misdemeanours. Such courts, however, according to the legal theory of Edward's time, are no natural outcome of tenure, like courts baron and customary courts, but must be claimed by grant or prescription¹.

As a matter of fact, there is usually a close connection between the manor and the township. Very usually the same geographical district which from one point of view is a town-

¹ 'The lord might also hold a court for his honour, for all his immediate tenants....The Abbot of Ramsey may bring to his court at Broughton his freehold tenants from seven counties.' Pollock and Maitland, *History of English Law*, vol. 1, pp. 585—6.

ship, is from another point of view a manor. Recent historians see in the township a community which is far more ancient than the manor ; a community which, so far as English history is concerned, we may call primitive ; a group of men or of families bound together, very possibly by kinship, which cultivates land by a system of collective agriculture, which is or has been the owner of the land, which to a large extent regulates its own affairs, decides how the land shall be tilled, decides whether new members shall be admitted, has a township-moot in which such affairs are settled, though it has not what we should call a court of justice. In course of time, we are told, this primitive community has in general fallen under the dominion of a lord, has become a community of tenants, and usually of tenants who hold in villeinage, has become a manor. But still for the purposes of public law, in particular for what we may call police purposes, it is as a township, and not as a manor, that the state takes account of it, and when, as sometimes happens, the vill is not coincident with the manor, it is the township and not the manor that must answer to the state for the apprehension of criminals and so forth. The two organisms exist side by side ; the older is not thoroughly absorbed in the newer.

All theories, however, as to the early history of manors and townships are beset by very great difficulties which at the present moment cannot be explained. What at present concerns us is that the state has fixed on the township, not the manor, as the unit responsible for good order. It is, I think, the theory of the thirteenth century and of later times that all England is divided into townships, that every bit of land lies in some vill, while it is not the theory that every acre of land must belong to some manor. Again, and this may help to explain the co-existence of township and manor, until lately, until 1290 it has been quite possible for landowners to create new manors ; they could not be allowed to alter the police system of the country by the creation of new townships. On the other hand, as a matter of fact, it is difficult to find a township which is outside the manorial system ; the township is represented, we have said, by its reeve and four best men, but the reeve is at least generally a manorial officer, a villein

elected by his fellow villeins, who is answerable to the lord for looking after the manor, and seeing that his fellow villeins do their due services; to have served as reeve is indeed regarded as a presumptive proof of personal villeinage¹.

(iv) Under the name of *boroughs* a certain number of communities have attained to a higher stage of organization than that of the generality of townships. But this is a matter of degree; at no time before the year 1835 can we say that the constitution of the various boroughs is the same throughout England, or even that it conforms to any one type. There hardly can be a history of the English borough, for each borough has its own history. That history largely depends on the charters that it has been able to obtain from the king or from other lords, and the liberality of the charter has depended on the price that the burghers were ready to pay for it; municipal privileges were only to be obtained for valuable consideration. At the end of the thirteenth century, however, the time of which we are speaking, the privileges of the boroughs, the institutions which make it something different from a mere township, may be summed up under the following heads.

(a) Immunity from the jurisdiction of the ordinary local courts. The borough has aspired to be a hundred all by itself—to be exempt therefore out of the jurisdiction of any hundred court. When the king's justices visit the county, the borough is represented before it not by the reeve and four men, but by a jury of twelve, just as every hundred in the county is represented by a jury of twelve. Occasionally more extensive immunities have been conferred, the borough is exempted out of the jurisdiction of the county court. Some of the richer and larger boroughs have gone even further than this—it has been granted to them that their burgesses may sue and be sued only in their own courts, and thus one cannot sue a burgess even in the king's court.

(b) Coupled with this immunity is the privilege of having courts of its own, usually with the jurisdiction of a hundred court; but the constitution of these courts varies greatly. In

¹ These views are substantially unchanged in the *History of English Law*, vol. I, pp. 594—634.

some cases the borough has already got itself free of the manorial system, and its courts are presided over by elected officers; in other cases the borough is still a manor and its court is the lord's court held under the presidency of his steward.

(c) Very frequently indeed the borough has by this time purchased the right of having its own elective officers—*ballivi*, *praepositi*, bailiffs or reeves, who stand on somewhat the same level as the bailiffs of the hundreds whom the sheriff appoints. Often again the burgesses have their own coroners, and in this respect are free from the organization of the county. In some cases the burgesses have already an elected mayor with ampler rights and powers than those of a bailiff or reeve.

(d) Very generally the burgesses have acquired the right to collect the taxes within the borough, and for this purpose to exclude the sheriff. For the ancient taxes they compound with a lump sum at the Exchequer—they are thus said to hold the borough in farm.

(e) Very generally also the borough constitution is interwoven with that of a merchant guild, an association of merchants which has by charter obtained the power of regulating trade. In some of the greater boroughs besides the merchant-guild, there are trade-guilds, or craft-guilds, the weavers' guild, the tailors' guild and so forth. A constitution in which the merchant-guild is the ruling body of the town, is gradually, and in very various stages, supplanting a more ancient constitution which was simply that of a privileged township or privileged manor.

The city of London resembles rather a shire than a township—already in Henry I's day it has got so far as to have sheriffs of its own, nay more, it holds the county of Middlesex in farm; its elective sheriffs act as sheriff of Middlesex¹. To be utterly and totally exempt out of the shire organization, to be counties of themselves, to have sheriffs of their own, is one of the ends for which the more ambitious boroughs are striving, though in Edward I's day none save London has attained it.

¹ The Charter of Henry I to London is printed by Stubbs, *Select Charters*, p. 108.

Boroughs which are also bishop's sees are distinguished as cities (*civitates*), and their burgesses are citizens. The term city tells us no more than this, it does not point to any higher degree of municipal organization or independence than does the term borough (*burgus*).

In later times, in the fifteenth century and onwards, we can arrive at a legal definition of a borough; the notion of a corporation has then been formed, a fictitious person, a juristic person, which has rights and duties which are quite distinct from the rights and duties of its members. But this notion, though developed in the Canon Law, only made its way into English law by slow degrees¹. The greater boroughs, however, of Edward's reign have already in substance attained to all or almost all of those distinctive characteristics which the later lawyers regarded as essential to corporate unity. These characteristics are five—the right of perpetual succession, the power to sue and be sued as a whole and by the corporate name, the power to hold lands, the right to use a common seal, and the power of making by-laws. Substantially these characteristics exist, but as yet they have not been worked into a theory by the conception of a fictitious person, who is immortal, who sues and is sued, who holds lands, has a seal of his own, who makes regulations for those natural persons of whom he is composed. The question what is the constitution of this fictitious person, how he is made up out of natural persons, has not yet arisen. The borough is as yet no more a corporation, no less, than is the township, the hundred, or the county; and if the borough may be spoken of as having rights and duties, as breaking the law and being punished, this is true also of the county, the hundred, and the township.

D. *Central Government.*

We turn to the central government, the king and his councils. This we are wont to regard as the main theme of constitutional law. We have here, however, postponed it,

¹ The idea is worked out in Maitland's *Township and Borough*, Cambridge, 1897.

for it can hardly be understood without some preliminary knowledge of the land law and of the local institutions. Now at the end of Edward's reign we find several different central institutions. In the first place there is the kingship; this is the centre of the centre. Then there is that assembly of the three estates of the realm, clergy, lords and commons, to which the name *parliamentum* is coming to be specifically appropriated. Then again the king has a council (*concilium*) which is distinct from parliament, and he has high officers of state, a chancellor, treasurer, constable, marshal and so forth. Then again he has courts, courts which in a peculiar sense are his courts: there is the King's Bench, the Common Bench, the Exchequer. All these now are distinct and have their different functions; but looking back a little way we see that they have not always been distinct, that a difference, for instance, between the king's council (*concilium Regis*) and the king's court (*curia Regis*) has but slowly been established. We will take therefore a brief retrospect of the history of our central institutions as a whole.

(i) *Before 1066.*

Among the German tribes described by Tacitus a kingship was by no means universal. In some cases the highest officers are *principes* elected by the tribe in its popular assembly; in other cases the tribe has already a *rex*; he also is elected, chosen it would seem because of his noble descent, but his power seems to be very limited. Our own forefathers when they first attacked the province of Britain seem to have had no kings; their leaders were ealdormen, in whom we may recognize the *principes* of Tacitus. But the kingship appears very soon; the process of conquering a new country would be very favourable to its development. The small states which were afterwards to coalesce into the kingdom of England, seem in other respects to have resembled the states described by Tacitus. Each had its popular assembly, the assembly of all free men, its *principes* or ealdormen elected in that assembly, and its king. The ealdorman presides over a *pagus* or district; the ealdormen, under the king's presidency, meet to determine the minor affairs of the state, but the weightier matters are

discussed in the folk-moot:—*de minoribus rebus principes consultant, de majoribus omnes.*

Gradually by conquest greater kingdoms are formed, at last the English kingdom. The way for this was prepared by the acceptance of the Christian faith and the organization of an English church. The old state which has thus been absorbed in a larger state does not lose its unity, it now exists as a shire of the new kingdom; sometimes the members of its once royal house continue to be its ealdormen; its folk-moot still exists, but now as a shire-moot, the county court of later days. The national assembly is not a folk-moot, not an assembly of the whole people, but a witenagemot, an assembly of the wise, the *sapientes*. This assembly when we look back at it seems a very unstable and indefinite body. It comprises the bishops, and towards the end of the period we often find a number of abbots present. It comprises also the ealdormen of the shires; their number varies according as the shires are administered singly or in groups. Besides these there are a number of persons who generally describe themselves as *ministri Regis*, or king's thanes, and this number increases as time goes on. It can never have been a very large assembly. 'In a witenagemot held at Luton in November, 931, were the 2 archbishops, 2 Welsh princes, 17 bishops, 15 ealdormen, 5 abbots and 59 *ministri*. In another, that of Winchester, in 934, were present the 2 archbishops, 4 Welsh kings, 17 bishops, 4 abbots, 12 ealdormen and 52 *ministri*. These are perhaps the fullest extant lists¹. The question arises, who were these *ministri* or king's thanes?

The *princeps* of Tacitus has around him a train of warlike companions (*comites*). It is the duty of all men to fight; the host, as is often said, is the nation in arms; but these *comites* are more especially bound to fight and to fight for their leader; this is their glory; it gives them a high place in the estimation of the community. We can recognize them in the *gesith*, the companion, of our own kings, a name which gradually gives place to that of thane, or servant, in Latin *minister*. A nobility by service is thus formed, and the thegnhood begins

¹ Stubbs, *Constitutional History*, vol. 1, § 52.

to be connected with the holding of land and to be hereditary. The unappropriated land, the land of the nation, the folk-land, forms a great fund whereout the king, with the consent of the wise, can reward his faithful followers¹. The thane begins to look somewhat like the tenant by knight service of later times, and the king's thane (for an ealdorman may have thanes) begins to look like a tenant in chief. The definite idea of a military tenure, *A tenet de Rege per servicium unius militis*, is not formed before the Conquest; but to an extent, and in a manner that is now very dark to us, the military service due comes to be connected with and measured by landholding². It is well to see that there were powerful economic causes in which this incipient feudalism had its roots. As agriculture becomes higher, as the distribution of property grows more unequal, as the art of war is developed, it becomes more and more convenient that some should fight while others till the soil: there is a division of labour, a specialization of employments. The work of feudalism goes on in the lowest strata of society as well as in the highest. While the king is gathering round him a body of armed vassals who are great landowners because they are vassals, the smaller men are putting themselves under the protection of lords, are content that their lords should do the necessary fighting while they till the lord's land. Dark as is the early history of the manor, we can see that before the Conquest England is covered by what in all substantial points are manors, though the term manor is brought hither by the Normans. Furthermore, in the interests of peace and justice, the state insists that every landless man shall have a lord, who will produce him in court in case he be accused. Slowly the relation of man and lord extends itself, and everywhere it is connected with land. The king's thanes then are coming to be the king's military tenants in chief.

¹ The term *folk-land* is now regarded not as denoting public land, but as 'land held without written title under customary law.' *History of English Law*, vol. 1, p. 62. The point was proved by Mr Paul Vinogradoff in 1893. *Eng. Hist. Rev.* VIII, 1—17. This does not imply that there was no unappropriated land, only that it was not called *folk-land*.

² Maitland throws some light upon this dark question in *Domesday Book and Beyond*, pp. 307—9.

We cannot then arrive at any strict theory as to the constitution of the witenagemot. It is an assembly of the great folk ; when there is a strong king on the throne it is pretty much in his power to say how it shall be constituted, to summon whom he will ; when the king is weak, it is apt to become anarchical. It has even been contended by Mr Freeman that every free man had in theory a right to attend it¹ ; but it is difficult to believe that a theory was maintained which was so flagrantly inconsistent with the actual facts. At all events it is clear that really this assembly was a small aristocratic body, tending always to become more aristocratic. The bishops constitute its most permanent and at times its most powerful element.

Such then is the national assembly, and at least on paper its powers seem vast ; it can elect kings and depose them ; the king and witan legislate ; it is with the counsel and consent of the witan that the king publishes laws ; the king and witan nominate the ealdormen and the bishops, make grants of the public lands, impose taxes, decide on peace and war, and form a tribunal of last resort for causes criminal and civil. It is a supreme legislative, governmental, and judicial assembly.

Such terms as these, however, may easily raise a false notion in modern minds. The whole business of a central government is as yet but small. Legislation is no common event ; as already said, all the extant dooms of kings and witan would make but a small book. Taxation is still more uncommon, of anything that can be called by that name we hear nothing until late in the day. The rents and profits of the public lands, the profits of the courts, afford a sufficient revenue for such central government as there is. The Dane-geld of Ethelred's reign is perhaps the first tax ; in 991, 994, 1002, 1007, 1011, a tribute was raised to buy off the Danish invaders. Lastly, though we have clear proof that the witenagemot acted as a court of justice, it was no ordinary court for ordinary men ; recourse to it was not encouraged ; the normal courts were the local courts, and suitors were forbidden to seek the royal audience until justice had failed them in the hundred and the shire.

¹ *Essays*, 4th series, pp. 444—7.

Meanwhile the king's splendour grew as the extent of his territory grew. From being merely the nation's leader, he became the lord of all men, and we may almost say the lord of all land and lord of all justice. While as yet almost all offences can be atoned for by money payments, treason becomes an utterly inexpressible offence. The national land becomes always more and more the king's land, and the king's favour is thus the source of honour and of wealth. What is more, justice is regarded as being the king's, he can grant jurisdiction to whom he pleases, indeed a grant of land now usually involves a grant of jurisdiction; the hundred courts come into private hands and manorial courts arise. This, the most dangerous element of feudalism, is rapidly developed towards the end of our period; in particular Edward the Confessor seems to have been lavish in his grants of jurisdiction¹.

We have said, however, that the king's splendour grows, rather than that his power grows. Whether he will be powerful or no depends now very much on his own personal character. That lordship of land and of justice of which we have just spoken, may be as easily a cause of weakness as of strength. Every grant that he makes of land or of jurisdiction raises up a new vassal, and unless the king's hand be heavy upon his vassals they may become too strong for him; he may end by being like the king of the French, *primus inter pares*, the nominal head of a turbulent baronage. The growth of large estates and private jurisdictions surrounds the great thanes with tenants and retainers bound to them by a close bond of fealty. Every man, it is true, can be called upon to swear allegiance to the king; but the king is distant and the lord is near.

Even the fact that to the very end of the period the kingship is not strictly hereditary, but elective—that on the Confessor's death the witan can elect Harold—that a power also of deposing a king has been exercised as late as the days of Ethelred the Unready, is really rather a mark of constitutional weakness, of a dangerous feudalism, than of popular liberty:—

¹ *Domesday Book and Beyond*, p. 87 ff.

the crown itself may become the prize of the rebellious vassal. The really healthy element in the constitution as it stood on the eve of the Conquest lies here—that as yet no English king has taken on himself to legislate or to tax without the counsel and consent of a national assembly, an assembly of the wise, that is of the great. This is a valuable barrier against mere despotism, though what the national assembly shall be a strong king can decide for himself.

(ii) 1066–1154.

William of Normandy claimed the throne as the heir nominated by the Confessor. That title the English did not admit; it had not been law among them that a king might appoint his successor. Harold was chosen king. The battle of Hastings was fought. William proceeded to seek the recognition of the divided and dismayed witan. He was chosen and was crowned, swearing that he would hold fast right law, and utterly forbid rapine and unrighteous judgment. It is needful to remember that neither of his sons came to the throne by what we should think or even by what would then have been thought a good hereditary title, needful, for to this we probably owe the preservation of a certain form and semblance of free government. Rufus excluded Robert and was willing to make, though also to break, the most lavish promises. Henry again excluded Robert; he was hastily elected by a small knot of barons, took the oaths which Ethelred had taken, and purchased support by a charter of great importance, for it was the model on which the charter of 1215 was framed. ‘Know ye,’ it begins, ‘that by the mercy of God and the common counsel of the barons of the whole realm of England I have been crowned king of the same realm.’ Henry dead, the crown was seized by Stephen of Blois, to the exclusion, as we should say, of the Empress Matilda. He was obliged to make large promises at his coronation, and in 1136 to issue an important charter, important rather as a precedent than as anything else, for a strong party favoured the Empress and the feudal anarchy broke loose. In fact we may regard our Norman kings as despotic; when there is not despotism there is anarchy; still a certain semblance of another form of govern-

ment is maintained, government by a king who rules with the counsel and consent of his barons.

Now the typical feudal king, if we may make such an abstraction, should have a court consisting of his immediate vassals, his tenants in chief. How much or how little he will be influenced by them, whether they will be utterly powerless or whether he will be but the first among equals is a different question—but such control over him as there is will be the control of a court thus formed. It would seem then according to this idea that the court of the English king should have consisted of his tenants in chief. But the tenants in chief were in England very numerous: this was the result of the Conquest and the subsequent grants of lands deemed forfeited—they were not just a few rulers and owners of vast provinces; there were a large number who held single knight's fees and single manors holden directly of the king. This should be remembered, for it affects the constitution both of the House of Lords and of the House of Commons in later days. The body of military tenants in chief was from the beginning a very heterogeneous body. If it included great feudatories with vast possessions and numerous vassals, who might aspire to play the part of sovereign princes, it included also a large number of men who were by no means very rich or very powerful. This must have rendered it practically impossible that the king's court should have become a powerful definite body formed strictly on feudal lines. The Conqueror we find holds an ordinary court three times a year at the three great festivals. 'Thrice a year,' says the Saxon Chronicle, 'King William wore his crown every year he was in England; at Easter he wore it at Winchester, at Pentecost at Westminster, and at Christmas at Gloucester; and at these times all the men of England were with him—archbishops, bishops and abbots, earls, thegns and knights.' A similar usage was maintained by his sons though the rotation thus described was not strictly observed. When however we ask who actually attended? still more if we ask who had a right to attend? we get a very uncertain answer. The passage in the Chronicle to which I have just referred is a specimen of the vague statements which are all that we get—all the men of England were

with him—archbishops, bishops and abbots, earls, thanes or knights; often we are put off with some such word as *proceres*, which has a very uncertain sound. The archbishops, bishops and abbots attend by virtue of their official wisdom, but the theory seems always to gain ground that they are there because they hold baronies of the king—at any rate they become tenants in chief and so for them there is certainly a place. As to the other persons who come, so far as there is any legal theory, it must be that they are the tenants in chief. Probably it is fully acknowledged that the king may lawfully insist on the presence of every tenant in chief—probably it is the general opinion that every military tenant in chief has a right to be there. But we ought to remember that attendance at court is no coveted privilege. We must be careful not to introduce the notions of modern times in which a seat in parliament is eagerly desired. This would render a good deal of history unintelligible. For the smaller men attendance at court is a burden of which they are very ready to relieve themselves or be relieved, and this is true, be the court in question the hundred court, or the county court, or the king's court.

What seems to us from the modern point of view a valuable political right, seemed to those who had it an onerous obligation. The great baron again had no particular desire to be about his lord's court; if, as was too often the case, he was not very faithful to his lord, his lord's court was the very last place in which he would wish to be. In point of fact we do not hear from the Norman reigns any assertion of an individual's right to attend the court. The king insists on bringing around him the most powerful of his tenants in chief, and such meetings are to him a source of strength. As Mr Dicey has pointed out in his *Essay on the Privy Council* it is the strong king who habitually brings his magnates round him. He thus keeps his eye upon them, and it strengthens his hands in dealing with the refractory that his measures are taken with the counsel and consent of their peers.

Under the Norman kings counsel and consent may have been little more than formality, and the king may have exercised the power of summoning only such of his tenants

in chief as he pleased—still such few legislative acts as we have from this period are done with the counsel and consent of the great. Thus the ordinance which removed the bishops from the secular courts and recognized their spiritual jurisdiction was made with the counsel of the archbishops, bishops, abbots, and all the princes of the kingdom. But anything that could be called legislation was seemingly very rare. The right of the council to join in taxation was perhaps admitted in theory. Henry the First speaks of an aid which had been granted to him by his barons: but there is nothing to show that any such consent was asked when the Danegeld was levied as repeatedly it was, and the king exercised the power of tallaging his demesne lands of his own free will. A court of this nature was again the highest court of judicature, for the great cases and the great men. It was in such courts that the king nominated bishops until the right of canonical election was conceded by Henry I, and even then the election took place in the royal court. The ceremony of conferring earldoms and knighthood and receiving homage were performed there; questions of general policy, of peace and war, of royal marriages and so forth seem to have been debated.

But a smaller body collects round the king, a body of administrators selected from the ranks of the baronage and of the clergy. At its head stands the chief-justiciar, the king's right-hand man, his viceroy when the king is, as often he is, in his foreign dominions. There is also the king's chancellor, the head of a body of clerks who do all the secretarial work; there are the great officers of the royal household and others whom the king has chosen. Under Henry I this body becomes organic; the orderly routine of administration begins even to be a check on the king's power; Stephen discovers this when he quarrels with the ministerial body. This body when it sits for financial purposes constitutes the Exchequer (*Scaccarium*), so called from the chequered cloth which lies on the table, convenient for the counting of money. Also it forms a council and court of law for the king, it is *curia Regis*, the king's court, and its members are *justitiiarii*, justiciars or justices of this court. Under Henry I they are sent into the counties to collect taxes and to hold pleas; they are then *justitiiarii*

errantes, justitarii itinerantes. During the whole period the term *curia Regis* seems loosely used to cover both the sessions of this permanent body and the assembly of the tenants in chief; the former may perhaps be regarded as a standing committee of the latter.

(iii) 1154-1216.

The reigns of the first three kings of the Angevin house form another and a fairly definite period in the history of the national assembly—which ends with the Great Charter of 1215. In its fourteenth clause we obtain for the first time something that may be called a distinct definition of that body. The twelfth clause declares that no scutage or aid shall be imposed in our realm save by the common counsel of our realm, *nisi per commune consilium regni nostri*—except the three ordinary feudal aids for redeeming the king's body from captivity, for knighting his eldest son, and for marrying his eldest daughter. There follows this—'And for the purpose of having the common counsel of the realm for assessing an aid except in the three cases aforesaid we will cause to be summoned the archbishops, bishops, abbots, earls and greater barons (*maiores barones*) singly (*sigillatim*) by our letters; and besides we will cause to be summoned by our sheriffs and bailiffs all those who hold of us in chief; for a certain day, that is to say, at a term of forty days at least; and to a certain place; and in all the letters of such summons we will express the cause of the summons.' Leaving out of sight, for a time, the clerical members of this body, we see that the national assembly is an assembly of the king's tenants in chief. But we see an important distinction; while the archbishops, bishops, abbots, earls and greater barons are to be summoned severally by letters addressed to them directly, the other tenants in chief are to be summoned not by name but by general writs addressed to the sheriffs. Now this distinction has been the subject of much disputation. It is mentioned in the Charter as an already well understood distinction, as one already recognized in practice; the difficulty has been to find its foundation—what makes a man a *baro major*? The principle cannot be found in feudal theory,

feudally all these persons stand on the same level, they are tenants in chief whether they hold whole counties or single knight's fees. One small class may be definitely marked off, namely the earls. The earl of the Norman reigns is definitely the successor of the earl of the days before the Conquest, who again is the successor of the older ealdorman. To a certain extent under William and his sons the earldom was still an office implying a considerable though somewhat vague power in the county which gave to the earl his title: but it had become less and less of an office, more and more of a mere dignity. The royal policy had been to prevent great jurisdiction falling into the hands of powerful nobles, and to rule the shires by sheriffs strictly accountable to the king and removable at a moment's notice. The earls, however, are a quite distinct class and a small class, for the title had not been lavishly given. As to the title of baron (*baro*) the clause before us is quite evidence enough, were there no other, that it was not confined to those who were entitled to the special summons, for this distinguishes not the *barones* but the *barones majores*. It would seem that at this time the title baron covered all the military tenants in chief of the crown. This is in accordance with the original meaning of the word—*baro* is simply man: this meaning it long kept in our law French: husband and wife are *baron* and *feme*; but *man* is the term opposed to *lord*; the man does homage to his lord, *hominium* or *homagium*, from *homo* a man; and it seems somewhat of an accident that while we speak of the *homage* of a manorial court, meaning thereby the body of tenants owing suit and service, we speak of the *baronage* of the king's court; the king's tenants in chief are his *homines* and his *barones* also. A line has then been drawn which divides these persons into two classes:—this probably is a result gradually attained by the practice of a century. The greater men had paid their feudal dues directly to the king's exchequer, the smaller had paid through the sheriff; the greater when serving in the army brought up their retainers under their own banners, the smaller served under the sheriff; the greater were summoned to the king's court directly, the smaller through the sheriff. But when we ask what greater and smaller mean, we can give no precise answer. In particular

we cannot say that a certain definite extent or value of land was either necessary or sufficient to make a man entitled to the special summons. Then again in this same Magna Carta we find a distinction as to reliefs, the heir of the baron is to pay for an entire barony (*baronia*) a hundred pounds, or according to some copies a hundred marks, the heir of the knight holding in chief of the king is to pay a hundred shillings for the knight's fee. It seems that the *baro* who has a *baronia* in the one clause is the *baro major* who is to have a special summons in the other clause. The process of narrowing the import of the word baron to those who are entitled to the special summons goes on during the following century. Tenancy in chief is not sufficient now to give a man this title of *baro*; he may hold in chief and yet be merely *miles*. The estate of the baron is a barony, but though there may be a theory floating about that the barony is or should be related to the knight's fee as the mark is related to the shilling, that is to say, that the barony should consist of thirteen knight's fees and a third—still it seems certain that an estate of this value was neither necessary, nor in itself sufficient, to entitle the holder to the special summons. Certain particular estates had come to be regarded as baronies and to pay the heavier relief, we can say very little more.

During the period which ends with the charter we have little evidence as to the constitution of the national assembly. The earliest writ of summons that we have is one addressed to the Bishop of Salisbury in 1205; of general summonses sent out through the sheriffs we have none preserved; but very possibly throughout the reign of Henry the Second the assembly had been constituted after the fashion prescribed by the charter. During that reign councils had been frequent; Henry was a strong king, not afraid of meeting his vassals, with a policy of his own and a policy which required their support. Some great laws, I may remind you, were made in his reign, though the text of them has too often perished—the Constitutions of Clarendon, the Grand Assize, the Assizes of Clarendon and Northampton. He professedly legislates by the counsel and consent of the archbishops, bishops, barons, earls and nobles of England—by the petition and advice of

his bishops and all his barons and so forth. The counsel and consent may still have been little more than a ceremony—the enacting power was with the king—and he could put in respite or dispense with the ordinances that were issued. The tyranny of John after the discipline of Henry was what was needed to turn this right of joining in legislation into a reality. In form the Charter is a Charter, a free grant by the king, in reality a code of reforming laws passed by the whole body of bishops and barons and thrust upon a reluctant king.

It is not very clear that in theory the consent of the national council had been necessary for taxation or that it had been in fact granted. Henry the Second takes a scutage or an aid or a carucage; the chroniclers do not say that the consent of his council or his court has been given or asked. The feudal theory that the man makes a free-will offering to relieve the wants of his lord seems to have subsisted; the consent which theory requires is rather a consent of the individual taxpayer than that of the national assembly. The notion that the majority of an assembly could bind a recalcitrant minority or could bind those who were not present had hardly been formed and would have been as unpopular as the notion that the king himself can extort just what he wants. We begin to hear of opposition to taxation: in 1163 Becket protests, in 1198 Bishop Hugh of Lincoln. But these protests of S. Thomas and S. Hugh are rather the protests of individuals who will not pay a tax to which they have not consented, than assertions that the power to tax is vested in the national assembly. The necessity however of extending taxation from land to movables occasions a new organization and a new order of ideas. The Saladin tithe of 1188 is perhaps the first attempt to tax personal property¹. Henry obtained from a great national council a promise of a tithe for the crusade; the assessment in such a case could not be left to a transaction between the individual taxpayer and the royal officers, so Henry's favourite machinery, a jury of neighbours, was employed; in 1198 this plan was applied to the assessment of the carucage, the land tax levied on the carucate or plough-

¹ *Select Charters*, p. 160.

land which had superseded the Danegeld¹. Thus taxation and representation are brought into connection—the individual is assessed by his neighbours, by a jury representing his parish, and so in some sort representing him. The idea that representation should accompany taxation gains ground as personal property is brought under contribution. In 1207 John attempted to exact a thirteenth of movable property. The bishops refused this on behalf of the clergy; John had to give up this plan of taxing them. The great crisis followed and the charter was won. No scutage or aid, save the three regular aids, was to be levied without the common consent of the realm. Other forms of taxation, taxes for example on movables, were not mentioned, nor could the national assembly, as defined in the fourteenth article, be considered as adequately representing all classes: it was an assembly of prelates and tenants in chief. This however was but a stage, and the principle that representation should accompany taxation was already outgrowing the terms in which for the moment it was defined. Already in 1213, two years before the charter, an assembly for the discussion of grievances had been held at S. Albans, to which were summoned not only the barons and bishops but also a body of representatives—four men and the reeve from each township on the royal demesne; already a few months later, on 7 Nov. 1213, John had summoned to a council at Oxford, four lawful men of every shire, *ad loquendum nobiscum de negotiis regni nostri*. These are the first recorded examples of the appearance of local representatives in the national assembly. Eighty years were yet to pass however before a representation of the commons or the communities of the realm would become for good and all a constituent element of that great council of the realm which had meanwhile gotten the name of a *Parliamentum*.

Meanwhile the administrative and judicial body, the *curia Regis* in its narrower sense, has been growing more definite and has been splitting up into various bodies with distinct functions, all under the control of the justiciar and the king. There is the Exchequer, a fiscal bureau, and court of law for all matters affecting the revenue—the judges in it

¹ *Select Charters*, pp. 256, 7.

still keep the title *barones Scaccarii*, although they are by no means always chosen from the ranks of the baronage. There is the Chancellor who keeps the king's great seal and who stands at the head of a clerical establishment, the royal chancery. There is now a small compact body of judges, justices of the king's court, professionally learned in the law. The judicial work has enormously increased owing to the law reforms of Henry II. This judicial body again is splitting into sections. One party of justices attends the king in his progresses, and here we see the beginning of the court of King's Bench, another sits term after term at Westminster and is going to be the Court of Common Pleas—for the Great Charter concedes that common pleas, i.e. suits between subject and subject, are not to follow the king's person, but are to be heard in some certain place. But a reserve of justice remains in the king to be exercised by him in the great council of the nation, or in some smaller council. Judicial visitations of the counties, eyres, *itineraria*, have become very frequent—the royal courts are becoming the courts of first resort for most cases; but the old local courts are brought into connection with the king's courts by these visitations. When the justices in eyre come into the county, the whole county must come before them; every freeholder must be there or send excuse, every hundred, every borough, must be represented by its jury of twelve, every township by the reeve and four men¹.

(iv) 1216–95.

After 1215 the next great halting-place in the history of the national assembly is the year 1295. In the latter year there is, we may say definitely, a parliament; the great outlines have been drawn once for all. During these eighty eventful years a new principle has emerged and become dominant. The assembly contemplated by the first edition of the great charter is a feudal assembly. It may be questioned perhaps in what right the archbishops, bishops and abbots find a place there—whether as the heads of the national church or

¹ For an elaborate survey of the judicial system at the end of Henry II's reign see Maitland, *Select Pleas of the Crown* (Selden Soc.), Intr.

as great vassals of the king ; they were both ; but the assembly is a court of tenants in chief. Now we can hardly say that the clauses of the charter which require the consent of an assembly of this kind to the imposition of a scutage or aid ever became part of the law of the realm. They were not repeated in any later edition of the charter. Henry III at his coronation was a child in the hands of William Marshall the great Earl of Pembroke, *rector regis et regni*, the head of the English baronage, and the king's guardians and ministers may have thought it undesirable that their hands should be bound by such clauses at a moment of grave peril when the foreigner was in the realm, and bonds may have seemed needless. This is not to be regretted ; had these clauses become a permanent part of the law Parliament might have formed itself on strictly feudal lines ; we might have had the Scottish parliament instead of the English. As it was, the necessity for raising money forced the king to negotiate with all classes of his realm. Henry was a thriftless, shiftless king, always extravagant and always poor. The meetings of the national assembly during his reign were many. Probably they were summoned in accordance with the principle laid down in the charter of 1215, the major barons being summoned individually, the lesser tenants in chief by general writs addressed to the sheriff. To such an assembly, held on the occasion of the king's marriage in 1236, we owe the Statute of Merton. These meetings were realities ; counsel and consent could no longer be taken for granted ; under John the baronage had learned to act together as a whole. Demands for money are met by demands for reform—demands which sometimes seem startling even to us. From 1234 onwards Henry was trying to rule without great ministers, without justiciar, chancellor, or treasurer. The scheme which from time to time pleases the baronage is that of a small number of ministers or counsellors appointed by and answerable to the common council of the realm. Henry was lavish with promises which are always broken.

Meanwhile the representative principle was growing. The notion of the representation of a community by some of its members must have been old. Already in the *Leges Henrici*

Primi we find that in the local courts the townships are represented by the priest, the reeve and four of the best men¹. This usage may already have been very old. Certainly at a little later date we find that the county court when summoned in all its fulness to meet the king's justices in their eyres comprises not only all the free tenants of the shire, but also a representation of the boroughs and townships, from every township four lawful men and the reeve, from every borough twelve lawful burgesses². The whole system of trial by jury in its earliest form implies representations—a person is tried by the country, by the neighbourhood, *ponit se super patriam, super vicinetum*. The voice of the jurors is the verdict of the country, *verdictum patriae*. When we look at the eyre rolls of this time (there are plenty of rolls from the first years of Henry III) we are struck by the deep root which this notion has taken:—the whole county is present and can speak its mind, every hundred is present, every township—the hundred of Berkeley says this, the township (*villata*) of Stow says that; the county, the hundreds, the townships can be amerced and fined for neglect of their police duties or for saying what is false. But representation does not necessarily imply election by the represented; representatives may be chosen by a public officer or by lot. However in 1194 we find that the juries for the various hundreds are appointed thus: four lawful knights are elected from the county, who choose two lawful knights from each hundred, who again choose ten lawful knights from the hundred to make with themselves the twelve jurors for the hundred. The coroners again from the first moment of their institution in 1194 had been elected by the county. This local organization had, we have seen, been made use of for fiscal purposes; assessments to taxes on movables and even on land had been made by local juries. At an exceptional crisis in 1213 four lawful men with the reeve from the vills of the royal demesne had been called on to meet the bishops and barons, and in the same year four discreet men from each shire had been summoned *ad loquen-*

¹ *Select Charters*, p. 105, VII, 7.

² *ib.* p. 358.

*dum nobiscum de negotiis regni nostri*¹. Throughout Henry's reign the use of local and representative machinery for the assessing and collecting of taxes granted by the assembly of barons and prelates becomes more constant and more important. Distinct progress is made in 1225, in 1232, in 1237. The documents you will find in the *Select Charters*². In 1254 a great step was made. The king had gone to Gascony and was in sore need of money; the regents, his wife and brother, summoned a great council to Westminster: to which each sheriff was to send four knights from his county, 'four lawful and discreet knights from your county whom the county shall have chosen for this purpose in the place of all and singular of the said counties to provide along with the knights from the other counties whom we have caused to be summoned for the same day what aid they will give to us in this our great necessity.' Representatives of the counties, representatives elected by the counties, then are summoned not merely to assess, but to grant an aid; there is to be no dealing with each county separately; all are to meet together and to provide together.

The great struggle which began in 1258 and ended with the battle of Evesham, 4 August 1265, did not carry the history of parliament much further. The Parliaments between that of 1254 and that of 1265—the word *parliamentum* was just coming into use, supplanting *colloquium* and other terms, and the assembly which forced the charter from John had recently been styled retrospectively *parliamentum Runimedeae*—did not contain, so far as we know, any representatives of shires or boroughs. The national strivings have another end in view: a small council elected by the barons to control the king, ministers elected by and answerable to the baronage, the reform of a miscellaneous catalogue of abuses. Beginning with the parliament held at Oxford in 1258, the Mad Parliament, we have complicated paper constitutions of an oligarchic

¹ *Select Charters*, pp. 276, 287, and *Constitutional History*, vol. 1, § 154. Mr Davis [*Engl. Hist. Rev.* April 1905, pp. 289—90] argues that in the earlier case the jurors were summoned not to S. Albans but to their respective shire-courts.

² *Select Charters*, pp. 355—6, 360—2, 366—8.

character, some of which work for a while, from which the king frees himself when he can. An important set of reforms redressing the grievances of the smaller tenants in chief was obtained in 1259, the Provisions of Oxford; but in the end it came to fighting. When the parties were already arming in 1261, the chiefs of the provisional government summoned to an assembly at S. Albans three knights from each shire; Henry ordered the knights to be sent not to S. Albans, but to Windsor. The battle of Lewes was won on 14 May, 1264. Almost immediately Simon of Montfort, who had the king in his hands, ordered the election of four knights to meet the king in parliament on 22 June. At the end of the year he summoned the famous parliament of 1265. As to bishops, abbots and barons only such were summoned as were friends of the party in power—only five earls, only eighteen barons. But each sheriff had a writ to return two discreet knights for each shire, and a similar summons was sent to the cities and boroughs. What was newest in this parliament was the presence of representatives of the cities and boroughs. Soon followed the battle of Evesham. There is nothing to prove that during the six last years of the reign the parliaments included representatives of shires or boroughs; but we cannot be quite certain of this; and proctors of the cathedral chapters were present at the Parliament of Winchester held immediately after the king's victory. One of these parliaments, that of 1267, passed the great Statute of Marlborough or Marlbridge, which conceded many of the reforms for which the nation had clamoured. It professes to have been enacted *convocatis discretioribus regni tam majoribus quam minoribus*.

The same doubt hangs over many of the early parliaments of Edward's reign, many of the parliaments which passed the famous statutes. In 1273 a great assembly was held to take the oath of fealty to the new king; there came the archbishops and bishops, earls and barons, abbots and priors, and from each shire four knights, and from each city four citizens. The Statute of Westminster the First (1275) declares the assent of archbishops, bishops, abbots, priors, earls, barons, and the community of the land. The Statute of Gloucester

(1278), the next great Act, was, as it says, made with the assent of the most discreet men both of high and low degree. In 1282 a curious expedient was tried; the king was fighting in Wales; he caused two provincial councils to be summoned, that for the northern province, at York, that for the southern, at Northampton, clergy and laity were summoned to each, four knights for each shire, two representatives for each town. This case was exceptional, and became no precedent. Another somewhat anomalous assemblage was held at Shrewsbury in 1283, with representatives of twenty-one selected towns and two knights of each shire. It is not certain that any representatives were present at the parliament of 1285, which enacted that great code which we know as the Statute of Westminster the Second; the very important Statute of Winchester in the same year (1285) is on the face of it merely the king's commandment, and we do not know that any representatives of the commons were present at its making. Again, in 1290, the Statute of Westminster III, the celebrated *Quia Emptores*, was enacted by the king at the instance of the magnates. Knights from the shires did attend that parliament, but the statute was passed a week before the day for which they were summoned. Two knights from each shire were summoned in 1294.

The next year gives us the model for all future parliaments. The archbishops and bishops are directed to bring the heads of their chapters, their archdeacons, one proctor for the clergy of each cathedral and two for the clergy of each diocese. Every sheriff is to cause two knights of each shire, two citizens of each city and two burgesses of each borough to be elected. Seven earls and forty-one barons are summoned by name. The clergy and baronage are summoned to treat, ordain and execute, the representatives of the commons are to bring full powers from those whom they represent to execute (*ad faciendum*) what should be ordained by common counsel. A body constituted in this manner is a parliament; what the king enacts with the consent of such a body is a statute. Very soon indeed these two terms become specifically appropriated; for a very short while they may be used in a laxer way:—parliament of course merely means a conference,

a meeting at which there is to be talk, debate, deliberation. Now and again the name is given to meetings of the king's ordinary council, or to meetings which would afterwards have been called *magna concilia* as distinct from *parliamenta*—meetings of the prelates and barons to which representatives of the commons were not called—or again to some anomalous assemblages which were occasionally summoned. But very quickly indeed usage becomes fixed: a *parliamentum* is a body framed on the model of 1295, it is frequently, habitually, summoned, and with its consent the king can make *statuta*¹.

Thus before the end of the thirteenth century the national assembly is ceasing to be a feudal court; it is becoming an assembly of the estates of the realm, that is to say, according to the theory of the time, of all sorts and conditions of men. Against the once common mistake of calling the king one of the estates of the realm, I need hardly guard you; it has been sufficiently denounced. The three estates are clergy, barons, and commons, those who pray, those who fight, those who work; this seems to have been considered an exhaustive classification of the divers conditions of men. A similar idea seems to have been very prevalent throughout Western Christendom and to have given rise to assemblies of estates; but the institutions to which it gave rise varied with the histories and circumstances of the different nations. For instance it is particularly noticeable about the English parliament that the burghers do not form a separate estate. There was perhaps some tendency towards an arrangement which would have drawn a broad line of demarcation between them and the knights of the shire, some danger (for such we may consider it) that the king would be able to get money by negotiating with the merchants grants of customs, indirect taxes which would have fallen on the consumer. There were such negotiations in Edward the First's day; but the danger was counteracted; the whole mass of representative members sat together and voted together and represented but one estate, the commons of the realm.

¹ The growth of parliament under Edward I is traced by Stubbs, *Const. Hist.* vol. II, c. 15.

Of course one such assembly as that of 1295 might well have been a solitary event which the historian would note on passing as an anomaly. Taking our stand at the death of Edward in 1307 we are not entitled to say that the sovereign powers which formerly were exercised by the king, or by the king and his barons, have definitely been transferred to an assembly of estates¹. It is only in the light of what was at that time future history, that the parliaments of Edward's last years have their vast importance. However, we know as a matter of fact that they did form precedents; that parliaments formed on the model of 1295 were constantly held during the coming centuries; that at last it was distinctly recognized that the sovereign power of the realm was vested in a king and a parliament constituted after this model. It is with such knowledge in our minds that we will examine the nature of this assembly.

The first of the three estates is that of the clergy. In the first place the bishops and a number of abbots are summoned by name. Their position is, we may say, somewhat ambiguous. The bishops were the heads of the clergy, the rulers of the church; but they were also tenants in chief of the crown, and held baronies. They had therefore a double claim to be present. There can be little doubt that their claim to be there as prelates of the church, apart from all question of baronial tenure, would have been fully admitted. In the first place there is a difference between the wording of the writs addressed to the temporal lords and that of the writs addressed to the bishops. Usually the lay baron is charged to come upon 'the faith and homage,' or the 'homage and allegiance whereby you are bound to us'; in the bishops' writs homage is not mentioned, though the bishops had to do homage for their temporal possessions; it is to their faith and love to which the king appeals. In the second place when a see is

¹ This proposition is amplified in Maitland's *Memoranda de Parlamento* (Rolls Series), 1893, a record of the parliament of 1305. 'A session of the King's Council is the core and essence of every *parliamentum*, the documents usually called parliamentary petitions are petitions to the king and his council, the auditors of the petitions are committees of the council, the rolls of parliament are the records of business done by the council, sometimes with, but much more often without, the concurrence of the estates of the realm.' Intr. p. lxxxviii.

vacant the guardian of the spiritualities of the see was summoned instead of the bishop; that guardian was in some cases the archbishop, in others the cathedral chapter; the barony of the vacant bishopric was not in his hands. However, the double right of the bishops provided abundant material for controversy in later times.

As to the abbots—whatever their original title may have been, it soon came to be regarded as title by baronial tenure. This was brought about by the abbots themselves; they had few interests in national politics, and attendance was burdensome. They therefore insisted that they need not attend unless they held by military tenure. The number of them summoned very rapidly decreases: under Edward I it is as high as 72; under Edward III it has fallen to 27, where it remains until the monasteries are dissolved.

But the representation of the clerical estate was not to be completed by the presence of the prelates. The inferior clergy were to be represented. Gradually the principle of representation by elected proctors (*procuratores*) had been making its way into the purely ecclesiastical assemblies. Owing to the rivalry between Canterbury and York, there never came to be any one ecclesiastical assembly for the whole realm; just for an occasional moment, under the authority of a papal legate, a body representing the clergy of all England might meet, but no such body became a permanent element in the government of the church. Gradually two convocations were formed, the one for Canterbury, the other for York. The growth of representation among the clergy was parallel with the growth of representation among the laity. The inferior clergy were directed to send proctors to represent them in the councils of the church. Towards the end of the thirteenth century the plan adopted in the province of Canterbury was that the parochial clergy of each diocese should be represented by two proctors, the clergy of each cathedral by one; these elected proctors, together with the archbishop, bishop, abbots, priors, deans and archdeacons, constituted the convocation. In the northern province a slightly different rule prevailed.

Now one must carefully distinguish these provincial convocations from the representation of the clergy in parliament.

The convocations are two ecclesiastical assemblies summoned by the archbishops. Edward attempted to bring the clergy to parliament. The bishops are to bring with them to the national assembly the heads of their chapters, their archdeacons, one proctor for the clergy of each cathedral, and two proctors for the clergy of each diocese. The clause directing the bishops to do this is known, from its first words, as the *praemunientes* clause. It has been in use ever since, is in use even at the present day, though since the end of the fourteenth century it has been steadily disobeyed. The clergy did not like this plan of being mixed up with the laity. They were the holders of great wealth; they had to bear a large share of taxation—but they preferred to deal with the crown separately, to vote their taxes in their own provincial and purely ecclesiastical convocations. Thus they missed the chance of becoming a large element in what was going to be the sovereign body of the realm. Parliament, instead of being an assembly of the three estates, became an assembly of lords, spiritual and temporal, and commons. But this refusal of the clergy belongs to a later time than that of Edward I; Edward made the attempt to get them to meet the laity, so that he might deal with all estates of men concentrated in one assembly.

The history of the baronage, the second estate of the realm, is a matter of difficulty: controversy has raged around it, it has become the theme of a large literature. The difficulty has at least in part been created by the continued existence down to our own time of this estate, and the high value that men have come to set on a seat in the House of Lords. From time to time peerages are claimed by titles which rake up the whole mass of obscure constitutional antiquities, and a committee of privileges of the House of Lords is called on to import into very remote times some definite theory of the baronage, some theory much more definite than had been conceived by the men of those times. No statute of limitations bars the claim to a peerage, and occasionally claims based on very ancient facts have to be discussed and decided.

A word about the way in which such claims are settled. It seems admitted that the House of Lords has a right to

decide on the validity of a new creation, a right which, for example, it exercised in 1856 when it decided that the patent of life peerage granted to Baron Parke, Lord Wensleydale, did not entitle him to sit in the House of Lords. On the other hand it seems certain that the House has no jurisdiction on claims to an old peerage. The power of deciding such claims the crown has kept to itself. As a matter of fact, in a case of doubt it refers the matter to the House of Lords, which refers it to a committee of privilege—the committee reports to the House, the House communicates the resolution to the crown, the crown acts upon it—the claimant is or is not summoned. But this is constitutional usage, not law, as has been very explicitly admitted by the lords in quite recent times¹. Now that this should be so even in our own day is, I think, very instructive. There is no law court into which the claimant of a peerage can go to establish his claim. Now-a-days this means next to nothing; if you think that by hereditary right you are entitled to be summoned as a peer of the land to the House of Lords, doubtless you will get your right. But it points to what has been very important, the power of the king to determine the estate of the baronage.

Lawyers and antiquaries have been forced to seek for a strict theory of the baronage, and have never been very successful in finding one. Doubtless, however, tenure is the quarter to which we must look: the idea of nobility of blood is not the foundation. That idea does occur all Europe over among the peoples of our own race if we go back far enough. The distinction between eorl and ceorl is a distinction between men who by birth are noble, and those who by birth are perfectly free but still not noble; and in the old dooms this distinction finds sufficient expression, it can be measured in numbers, the wergild of the noble is so many times that of the

¹ This was very explicitly admitted by Lord Campbell in the Wensleydale case (Anson, *The Law and Custom of the Constitution*. Part 1: Parliament. 3rd ed. p. 208), and again by Lord Chelmsford in the Wiltes case (1869, L. R. 4, H. L. 126). Lord Chelmsford went so far as to hold that a committee of privileges, hearing such a claim, is quite unlike a judicial tribunal in this respect, that it is not bound by the resolutions of a previous committee; it may give diametrically opposite advice in one case to that which has been given in another; it pronounces no judgment, it merely gives advice. F. W. M.

non-noble, the oath of the eorl will outweigh the oaths of so many ceorls. But for a long time before the Conquest the nobility of birth had been supplanted by a nobility of tenure and of office. The thane is noble because of his relation to the king, a relation intimately connected with the holding of land, and a nobility of tenants in chief, crown vassals, would be the natural outcome. But as already pointed out, the Norman Conquest put difficulties in the way of the formation of such a nobility. The aggregate body of tenants in chief was a very miscellaneous mass, including very great men, and men who might relatively be called very small, the tenant who discharged all feudal obligation by coming in person to the field, and he who was bound to bring twenty or fifty knights. The grades were many and small; there was no one place at which a hard line could be drawn; and probably it suited the king very well that none should be drawn, that he should not be hemmed in by a close aristocracy; against the great feudatories he relies on the smaller tenants in chief. The practice of the royal exchequer and of the royal army does in time draw a line; on the one hand stand the *barones majores*, who deal directly with the exchequer, are summoned personally to the army or the council; on the other hand stand *barones minores*, *barones secundae dignitatis*, who deal with the sheriff, and are summoned through the sheriff; the lands which the former hold are recognized as forming baronies; for the purpose of feudal dues they are treated as wholes, they pay a lump sum for the relief; those who have not baronies pay on each knight's fee. Finally the word *baro* becomes appropriated to tenants of the former class; the latter are *tenentes in capite*; but the word *baro* is long used somewhat vaguely; the *barones* of one clause of the great charter seem to be the *barones majores* of another.

It has been contended by some that tenure by barony was a particular kind of tenure differing from tenure by knight service. The difficulty, however, has been to find in what respect these tenures differed. To say that the one implied the right to the special summons while the other did not explains nothing, and brings us back to the point whence we started, that tenure by barony is the tenure of those who are

pecially summoned. When the law of tenures attains its fully developed form and a systematic expression, we do not find tenure by barony as one of the *kinds* of tenure; Littleton (circ. 1480) does not make it a kind of tenure; a man may hold a barony, certain parcels of land have long ago been recognized as forming a barony, but he does not hold by barony, he holds by knight service or by grand serjeanty. In all private law the distinction has no place, it is utterly unlike the distinction between tenure by knight service and tenure by socage. This is a question which has been contested by Selden, Madox and other very learned persons. I will state the cautious conclusion of Dr Stubbs: 'Whether the baronial honour or qualification was created by the terms of the original grant of the fief, or by subsequent recognition, it is perhaps impossible to determine. As we do not possess anything like an early enfeoffment of a barony, it is safer to confine ourselves to the assertion that in whatever form the lands were acquired or bestowed, the special summons recognized the baronial character of the tenure, or in other words, that estate was a barony which entitled its owner to such special summons'.¹ Thus we seem to be involved in a circle—Who is entitled to the special summons? He who holds a barony. But what estate is a barony? One which entitles its owner to a special summons.

The next point is this:—In the course of the thirteenth century knights representing the shires are summoned to parliament. As this practice is introduced, so the practice directed by John's charter of summoning the minor tenants in chief by means of general writs addressed to the sheriffs—a practice which may have been more or less carefully observed during the reign of Henry III—was abandoned. The minor tenants in chief would be represented in parliament by the elected knights of the shire. Probably they were well content with this; to attend at their own cost assemblies in which they had little or no weight was a burden. They fell definitely into the mass of the commons: there was no longer any political distinction between the tenants in chief who do not get the

¹ *Constitutional History*, vol. II, § 189.

special summons (and who have now altogether lost the name of barons) and the tenants of mesne lords.

The baronage then is the body of men who are summoned specially to parliament—they are summoned because they hold baronies, estates which have been recognized as baronies by the special summons, and by the baronial relief. Several questions arise at this point, which are difficult of solution. First, was the king restricted to the summoning of those who really held what had already been regarded as baronies? The answer seems to be that such must long have been the theory, but a vague theory by which the king was not very strictly bound. In the fourteenth century, as already remarked, a large number of abbots were relieved from the duty of attendance on the ground that they did not hold baronies. It is not known, however, that any temporal lord was ever relieved for a similar reason. On the other hand it is not known that the peers ever objected to the introduction into their midst of one who had no territorial barony—nor for a long time do we hear of anyone protesting that he has a right to be summoned merely because he holds a territorial barony. Probably the theory prevailed and was more or less regularly observed (how regularly is a difficult question, involving a terrible investigation of pedigrees) until in the reign of Henry VI the practice crept in of creating barons by letters patent. Not very long after this it becomes the definitely established doctrine that a writ of summons followed by an actual sitting in the House makes a peer, barony or no barony. This, however, left open the question whether the possession of a barony did not give the right to be summoned, and that question was hardly settled until our own day. During the Middle Ages lands could not be devised by will, the king's tenants *in capite* could not alienate without royal license, and no great absurdity could have resulted from the doctrine that the right to a summons could be conveyed along with the land. Certainly it seems to have been thought in the fifteenth century that the dignity might be made the subject of a family settlement, that the dignity along with the land might be entailed. But in 1669 the contrary was definitely laid down by the king in council on a claim to the barony of Fitzwalter. Barony by tenure

was declared to have been discontinued for many ages, and not in being, and so not fit to be 'received or to admit any right of succession thereto.' The question was reopened in 1861 by the Berkeley Peerage case, and what was by this time generally understood to be law was adopted and applied. No one now can claim a seat in the House of Lords on the ground that he holds a land barony. With our modern freedom of alienation some very quaint results might have been produced by a contrary decision. He must claim under writ of summons or letters patent.

As regards barony by writ of summons there are still some questions which remain very open. It may be doubted whether Edward I in summoning a baron intended to bind himself and his successors to summon that man and his heirs to the end of time. But at least very soon it became the rule to summon those and the heirs of those who had already been summoned. Whether a writ of summons conveyed a hereditary right was a question very warmly discussed in the seventeenth century between Coke and Prynne. Prynne produced a long list of cases in which apparently a person who was summoned once, or more than once, was not again summoned, and in which the heirs of a person who was summoned were not summoned. Dr Stubbs says that on careful examination Prynne's list shrinks into very small proportions; most of them can be accounted for by the circumstances of the particular cases, such as minorities¹. At any rate it became the orthodox doctrine that the crown may not withhold the writ from the heirs of a person who has been once summoned, and who has taken his seat. This was definitely decided in 1673 in the case of the Clifton barony². It seems to have been considered law already in Coke's day³. In 1677 the Freshville case decided the point that it is not enough to show that one's ancestor has been summoned, one must show also that he took his seat. Until he takes his seat he is no peer. In this respect barony by writ differs from barony by patent.

¹ *Constitutional History*, III, § 751 note.

² Anson, *Parliament*, p. 196.

³ Abergavenny's Case, 12 Rep. f. 70.

The patent itself makes a man a peer¹. On the face of a writ, you will understand, there is nothing about any peerage, any future summonses, any summoning of heirs—heirs are not mentioned—simply A. B. is summoned to come to the next parliament. A distinct theory of hereditary right has gradually been developed, superseding an indistinct theory of right by tenure.

But besides the prelates and the barons there are other persons who are summoned by name, members of the king's council, in particular the judges, and these distinctly do not hold baronies and are not barons. In the parliaments of Edward's reign the royal council meets the estates of the realm. Edward probably had no idea of restraining himself from seeking the advice of any whose advice might be worth having. It is only very gradually and as a notion of a hereditary right of peerage grows, that these councillors are recognized as having no real place in the deliberations of parliament. They continue to be summoned, even at the present day the judges and the law officers of the crown are summoned by name to attend the parliament:—but before the end of the Middle Ages it became established doctrine that they had no votes, that they were not even to speak unless asked for their opinion. Thenceforward their attendance became little more than a form—but, as just said, a trace of it is retained at the present day:—the judges are summoned to parliament, there are places for them in the House of Lords, and that House has a right to compel their attendance and to take their opinion on matters of law, a right which it occasionally exercises even now though only when it is sitting as a court of law.

¹ The question seems still open whether to prove the summons and sitting of one's ancestor at any time, however remote, is sufficient. In one recent case (the *de L'Isle Peerage*) Lord Redesdale seems of opinion that the summons and sitting must have taken place on this side the year 1382. This year seems to be chosen because of a statute, 5 Ric. 2, stat. 2, cap. 4, which says that 'all and singular persons and commonalties which from henceforth shall have the summons of the parliament, shall come from henceforth to the parliaments in the manner as they are bound to do, and have been accustomed within the realm of England of old times.' I much doubt whether that statute was directed to making the peerage more hereditary than it was: it seems to have had quite another object. Dr Stubbs would go back as far as 1295, or even further, should earlier writs be discovered. It is a small point, but rather instructive. F. W. M.

It remains to speak of the commons of the realm—the third estate. And first of the word ‘commons.’ It seems to me that two ideas have been blended. The persons who enjoy no special privilege, who have no peculiar status as barons or clerks, are common men. But I do not believe that this was the notion present to the minds of those who first used the term ‘the commons’ in contrast to ‘the barons’ and ‘the clergy.’ I do not think that the word ‘a commoner’ as opposed to ‘a peer’ is old. ‘The commons,’ says Stubbs, ‘are the communities or *universitates*, the organized bodies of freemen of the shires and towns, and the estate of the commons is the *communitas communitatum*, the general body into which for the purposes of parliament these communities are combined¹.’ I may remind you of the French commune, and that the language of our law just at the time when parliament was taking shape was French. Any way the representatives who appeared in parliament were not representatives of inorganic collections of individuals, they represented shires and boroughs. It is a little too definite to say that they represented corporations aggregate—the idea of a corporation aggregate had not yet been formed by our law, and the English county has never become a corporation. Still this word is only a little too distinct. The county was already a highly organized entity. County and county court were one. The language of the time did not distinguish between the two—the county court is the *comitatus*—there is no such phrase in our books as *curia comitatus*, *curia de comitatu*. On the judicial rolls of the time complaints are not uncommon of what the county has done; the county has delivered a false judgment; the county by four representative knights comes into the king’s court and denies that it has given a false judgment; the county even wages battle by its champion; if the county does not appear then the county is amerced. It is well to remember that all this had been so for a long time before the knights of the shire were summoned to parliament. In summoning the county to send representatives Henry, De Montfort and Edward were only putting old machinery to a new use. This helps us

¹ *Constitutional History*, vol. II, § 185.

to face a question which has often been discussed—namely, who elected the knights of the shire who came to the early parliaments. One answer has been, the king's tenants in chief—these minor tenants in chief who were not summoned by name. There is something to be said for it. The court of a feudal king should consist of tenants in chief—should have no sub-vassals in it. The assembly recognized or designed in John's charter was an assembly of this sort. It became impossible or useless to call up all the tenants in chief, so instead the lesser of them, those who had no special summons, were allowed or compelled to send representatives. The constituency then of the knight of the shire was an assembly, not of all freeholders, but of tenants in chief: only gradually as tenure becomes of less importance, and as the working of the *Quia Emptores* largely increases the number of tenants in chief, are the tenants of mesne lords admitted. But this doctrine has been very generally rejected by modern historians, by Hallam and by Stubbs. From the first the language used of the knights is that they are to be elected in full county court, by the assent of the whole county, *in pleno comitatu, per assensum totius comitatus*, and so forth. Such language had already a definite meaning, it had been constantly used for other purposes; it referred to the county court; the county court was not an assembly constructed on feudal lines; it comprised the whole body of freehold tenants holding whether by mesne or by immediate tenure of the king. Those who have maintained the opposite opinion have been forced to imagine another county court, one attended only by the tenants *in capite*; to the existence of any such assembly no record bears witness; such an assembly could not have been indicated by the well-known phrases *plenus comitatus, totus comitatus*. If it be urged that a representation of sub-vassals is opposed to the feudal spirit, the answer is that Edward's legislation is pervaded by a spirit which is anti-feudal, it strives to lessen the public, the political importance of tenure, to bring all classes into direct connection with king and parliament. This is, I believe, the general opinion at the present day—but it has some difficulties to overcome, for it seems clear from a series of petitions in the fourteenth century

that the question as to who were to pay the wages of the knights of the shire was a somewhat open one. The tenants of mesne lords contended that they were not bound to contribute, but they do not, I believe, urge as a reason for this contention that they are not represented. It seems very possible that practice differed somewhat widely from legal theory, that the smaller tenants, socagers and so forth, did not often attend the county court, that the office of representative was by no means coveted, and that the election was *de facto* made by the great men. But it seems almost impossible to believe in the face of existing documents that the electoral body was not from the first the whole body of freeholders, the *totus comitatus*. The Act of 1430 (8 Hen. VI, c. 7), which regulated the county franchise for four centuries, was (as appears by the preamble) passed to prevent riotous and disorderly elections—it ordains that the electors are to be people dwelling in the county, whereof every one of them shall have free land or tenement to the value of 40 shillings by the year at the least above all charges. The elector must be a freeholder, a forty shilling freeholder—he must have free land or tenement, but no distinction is noticed between tenure of the king and tenure of a mesne lord, nor between military tenure and tenure by socage. Certainly this act and some others of the two previous reigns do not favour the belief that such distinctions had ever been of importance.

I have stated these two opinions, viz., that the persons who attended the county court for the election of representative knights were (a) the tenants in chief of the crown, (b) all the freeholders—and I have said that the latter is the opinion which now prevails. For my own part, however, I doubt whether either of them gives us the real truth—reasons for this doubt you can see, if you wish it, in the *English Historical Review* for July 1888. Perhaps I ought just to state what I believe to be the truth. It seems to me that the duty of attending the county court, the duty of going there to sit as a judge, was conceived as being in general incumbent upon all freeholders, but that it had become a burden annexed to particular parcels of land, so that when the number of freeholders was increased by subinfeudation the number of suits due to the county court

was not thereby increased. This manor, or this township, or this tract of land which belongs to A, owes a suit to the county court. A enfeoffs B, C, D with parts of the land. The whole manor, township, or tract still owes one suit, must send one suitor, but it owes no more. Who shall do that suit is a matter that A, B, C, D can settle among themselves, and they do settle it among themselves by the terms of the feoffment. As regards the king or the sheriff they are all jointly and severally liable for the coming of one suitor, as between themselves they can determine who shall discharge the burden. So again in a case of inheritance—A holds land which owes a suit: he dies and it descends to his three daughters B, C, D: one or other of them must do the suit, and in general the burden falls on the eldest daughter.

It was in this manner that the county court, which met month by month as a court of law, was constituted. Those who were bound to come there were not necessarily tenants in chief, nor again were all the freeholders bound to come—the persons who were bound to come were those persons who by means of bargains between lords and tenants were answerable for that fixed amount of suit to which the court was entitled. The evidence of this consists in a large number of entries in documents of the thirteenth century, e.g. the Hundred Rolls, in which it is said that A or B does the suit to the county court for a whole manor or township. Of course it is conceivable that when the county court sat for the purpose of electing knights of the shire, other persons attended and were entitled to attend, besides the regular suitors who came month by month—perhaps all freeholders might come:—but I do not see the proof of it—such phrases as *plenus comitatus*, *totus comitatus* are constantly used of the county court as constituted for judicial purposes, the court which sat month by month, and my contention is that by no means every freeholder owed suit to that court.

A similar question has been raised about the boroughs. Were the boroughs which were directed to return representatives only the demesne boroughs of the crown or all the boroughs in the shire? Both Hallam and Stubbs have written in favour of the latter view. The election of burgesses to

represent the towns was not a matter altogether distinct from the election of knights of the shire. A writ was sent to the sheriff of each county commanding him to procure the election of two knights from his county, two citizens from every city, two burgesses from every borough. The election was probably made in the boroughs and then reported to the county court; but all was under the direction of the sheriff of the county until the fifteenth century, when a few towns succeeded in getting made counties of themselves and having sheriffs of their own. Indeed, so late as 1872, no writ was addressed to any officer of the borough; the sheriff of the county, as of old, was told to send two knights for the shire, two citizens for every city, two burgesses for every borough. See the writ printed by Sir William Anson, where the sheriff of Middlesex is to return not only two knights of the shire, but also two citizens for the city of Westminster and two burgesses of each of the boroughs of the Tower Hamlets, Finsbury, and Marylebone¹. But during the Middle Ages the cities and boroughs were not thus named. A considerable power seems thus to have been left in the sheriff's hand. What were boroughs and what were not was to a certain extent ascertained by the ordinary course of justice. Some boroughs, but by no means all, had charters; but when the justices in eyre came to the county court, every borough was represented by its twelve burgesses, while the common country village, *vil-lata*, township was represented by the reeve and four best men. In telling the sheriff, therefore, to return burgesses from every borough, terms were used which had an ascertained meaning. We do find the idea of tenure cropping up at times, as though only the king's demesne boroughs had a right to be represented, or rather were bound to be represented. But it is difficult to make the facts correspond with any theory, and certain that the boroughs on one pretext and another evaded the duty of sending representatives and paying their wages whenever they could. There is one case in which a borough (Torrington) actually obtained a charter absolving it from the obligation.

¹ Anson, *Parliament*, pp. 57—8.

By whom were the representative burgesses elected? As regards Edward's day, and indeed much later times, our materials for answering this question are very scanty. The one thing that we can say with some certainty is that the qualification varied from borough to borough. When at last we get accurate information, we find that it varies very greatly. In this borough the franchise is extremely democratic, every person who has a hearth of his own may vote; in another, every one who contributes to the local rates, who pays scot and bears lot; in another, every one who has a free tenement. Elsewhere the franchise is confined to the members of a small civic oligarchy. We can say with some certainty also that the more democratic the qualification, the older it is. In Edward's day contribution to the local burdens may have often qualified a man to vote; in other cases tenure was important, he had to be a tenant of the manor constituted by the borough; in some cases, membership of the merchant guild may have been requisite; but the small close corporations belong to a later age. The important thing to notice is that this matter was decided by no general law; each borough was suffered to work out its own history in its own way, and to buy what privileges it could from the crown.

That notions of tenure had a considerable, though a restricted, influence on the constitution of parliament is shown by the history of the counties palatine. The county of Chester returned no knights until 1543; the county of Durham returned none until 1672.

At the time of which we are speaking (1307), the parliament of the three estates was by no means the only organ of government; indeed, as we have seen, it was only just coming into being. Most of the great statutes of the reign were made in assemblies of the older type, assemblies in which the commons and the inferior clergy were not represented. Such assemblies of prelates and barons were held in later times, and got the name of *Magna Concilia* which distinguished them from true *Parliamenta*; only by slow degrees was the line established between what could be done by a *Magnum Concilium* and what could be done by a *Parliamentum*.

But besides these grand councils, the king had a permanent council in constant session. This permanent or ordinary council had grown out of the *curia Regis* of earlier times; the word *curia* comes to be more and more definitely appropriated to a judicial body, and the judicial body becomes distinct from the administrative deliberative body to which the king looks for advice and aid in the daily task of government. A *concilium* as distinct from the *curia* first becomes prominent during the minority of Henry III—it acts as a council of regency. It is generally called simply *Concilium Regis*, as opposed to the *commune concilium regni*; its members are *magnates de concilio, conciliatores*. It seems to comprise the great officers of state, justiciar, chancellor, treasurer, some or all of the judges of the royal *curia*, and a number of bishops, barons and other members who in default of other title are simply councillors. The chroniclers now and again inform us that one person was made a member of the council and another dismissed; but (and this is noticeable) there is from the first something informal about its constitution;—it needs no formal document to make a man a member of the council; the king can take advice in what quarter he pleases, and the so-called councillor has no right to be consulted. Just while parliament is growing this council also is growing. The task of government becomes always more elaborate; it requires constant attention; it cannot possibly be accomplished by the king without the help or interference of a national assembly summoned from time to time. During Henry's reign the scheme of reform constantly put forward by the barons is that they should elect the council; Henry's councillors have too often been his hated foreign favourites. This scheme breaks down. Under Edward the council is a definite body; its members take an oath; they are sworn of the council—swearing to give good advice, to protect the king's interests, to do justice honestly, to take no gifts. Under Edward the relations of this king's council to the great council of the realm are still indefinite; all works so smoothly that there is no struggle, and consequently no definition. Both in his parliament and in his council the king legislates, taxes and judges—indeed it is often hard for us to say whether a given piece of work is, has or has not been

sanctioned by the common council of the realm. Let us take these points separately—(1) legislation, (2) taxation, (3) judicature.

(1) That the king could not by himself or by the advice of a few chosen advisers make general laws for the whole realm seems an admitted principle. The most despotic of Edward's predecessors had not claimed such a power—it is with the counsel of prelates and barons that they legislate. On the other hand, that the commons or inferior clergy must share in legislation was not admitted, was not as yet even asserted. As already said, the great laws of the reign—laws which made the profoundest changes in all parts of the common law, laws which all subsequent generations have called statutes, statutes which are in force at the present moment—were made in assemblies in which the commons were not represented. But again it seems to have been allowed that there were regulations which might be made without the sanction of a national assembly of any kind. The king in his council could make, if not statutes, at least ordinances. Some even of what we now call the statutes of Edward I do not on their face claim any higher authority than that of the king and his council. Here is a fruitful source of difficulty for future times. Can any line be drawn between the province of the statute and the province of the ordinance? Under Edward all works so smoothly that the question is not raised. We can say no more than this—and it is vague enough—that important and permanent regulations which are conceived as altering the law of the land can only be made by statute, with the consent of prelates and barons. Minor regulations, temporary regulations, regulations which do not affect the nation at large can be made by ordinance.

(2) We turn to taxation, and may begin with a few general reflections as to past history. In the first place, the king had not been nearly so dependent on taxation as a modern government is. Indeed it is not until the very end of the Anglo-Saxon time that we hear of anything that can be called a tax, not until it is necessary to pay tribute to the Danes. Let us briefly reckon up the sources of income which the kings enjoyed after the Conquest. In the first place there

were the demesne lands of the crown. The remnant of the old folk land had become *terra Regis*, and this constituted the ancient demesne¹. Then escheats and forfeitures were constantly bringing to the king's hand new demesne lands. Apart from his being the ultimate lord of all land, the king was the immediate lord of many manors—he was by far the largest landowner of the kingdom. Secondly, there were his feudal rights—rights which had steadily grown in some directions, if they had been diminished in others. The charter of 1215, by clauses which were never again repeated, forbade him to impose any scutage, or any aid save the three regular feudal aids, without the common counsel of the realm. The charter defined the amount to be paid for reliefs, but besides scutages, aids and reliefs, he was entitled to wardships and marriages—his rights in this direction had steadily grown, and these were profitable commodities. Thirdly, the profits of justice in the king's courts must have been very considerable. Under John the sale of justice had become scandalous. By the charter, he promised to sell justice to none—but without exactly selling justice, there was much profit to be made by judicial agencies: fees could be demanded from litigants, and in the course of proceedings, civil as well as criminal, numerous fines and amercements were inflicted. Fourthly, the king had many important rights to sell, in particular the right of jurisdiction, and though the more far-sighted of the kings dreaded and checked the growth of proprietary jurisdiction, there was always a temptation to barter the future for the present. The right to have a market was freely sold, and many similar rights. Pardons again were sold. The towns had to buy their privileges bit by bit. What is more, the grantee of any privilege had in practice to get the grant renewed by every successive king. That the king was bound by his ancestors' grants might be the law, but it was law that no prudent person would rely on. Offices too, even the highest offices of the realm, were at times freely bought and sold—this does not seem to have been thought disgraceful. Fifthly, a good deal could be made out of the church—when a bishop died the king took the temporalities, the lands, of the see into his own

¹ See p. 57.

hand, and was in no hurry to allow the see to be filled; this however was an abuse. Sixthly, the king had a right to tallage the tenants on his demesne lands, and on his demesne lands were found many of the most considerable towns. This seems the right rather of the landlord than of the king; other lords with the king's leave exercised a similar right over their tenants in villeinage. The tenants on the demesne lands had for the most part held in villeinage; the burghers had very generally bought themselves free of villein services in consideration of an annual rent, but the king had retained the right to impose a tallage from time to time—to impose a certain sum on the borough or the manor as a whole—or rather an uncertain sum, for we hear of no limit to the amount. Lastly, somehow or another, the process is obscure, the king had become entitled to certain customs duties: Magna Carta recognizes that there are certain ancient and right customs (*antiquae et rectae consuetudines*) which merchants can be called upon to pay, and with these it contrasts unjust exactions, or *maletolts*. To all this we may add that the obligations of tenure supplied the king with an army which could be called up in case of war.

Here we shall do well to note that at this time and for several centuries afterwards, no distinction was drawn between national revenue and royal revenue; the king's revenue was the king's revenue, no matter the source whence it came; it was his to spend or to save, as pleased him best; all was his pocket money; it is to later times that we must look for any machinery for compelling the king to spend his money upon national objects.

But large as had been the king's income, and free as he was to deal with it in his own way, it had not been found large enough. Direct taxes had been imposed: a land tax, for some time called Danegeld, afterwards carucage, a tax of so much on the carucate or plough-land; then as already said, under Henry the Second the taxation of movables begins. We can hardly say that for such taxation the theory of the twelfth century requires a decree of the national assembly; it but slowly enters mens' heads that the consent of a majority of an assembly, however representative, can be construed to be

the consent of all men:—rather the idea is that a tax ought to be a voluntary gift of the individual taxpayer, and now and again some prelate or baron is strong enough to protest that he individually has not consented and will not pay. The clauses of the charter of 1215, to which reference has so often been made, mark a very definite step:—no scutage or aid (save the three feudal aids) is to be imposed without the counsel of the prelates and tenants in chief. But these clauses are withdrawn; it seems to be thought hard that the child Henry should be compelled to make this concession, particularly at a moment when a foreign enemy is within the realm. However, these clauses are in fact observed; Henry, though he sometimes extorts money in irregular ways, does not attempt to tax without the common council of the realm. This council is as yet but an assembly of prelates and magnates; it grants him taxes on land and on movables, but we can see a doubt growing as to how far it represents all classes of men, how far the consent of the unrepresented classes is necessary. Henry is driven to negotiate with the inferior clergy, and with the merchants. In 1254 knights of the shire are summoned to treat about a tax. That however remains an isolated precedent, and the parliament summoned by De Montfort can hardly be called a precedent at all. It is not therefore until 1295 that a regular practice of summoning the representatives of the commons and of the inferior clergy begins¹. Each estate now taxes itself; thus in 1295 the barons and knights of the shire offered an eleventh, the burgesses a seventh, the clergy a tenth. On this followed the great crisis of 1297. The rather elaborate circumstances we must leave undescribed; Edward was in great need of money: the pope Boniface VIII had published the Bull *Clericis laicos* forbidding the clergy to pay taxes to any secular power; the barons, again led by the Constable and Marshal, Bohun and Bigot, refused to serve in Flanders, contending that they were not bound to do so by their tenure; Edward seized the wool, the staple commodity of England, and exacted an impost on it; he also obtained the grant of an aid from an irregular assembly. The barons armed against him, and he was forced

¹ For Edward I's earlier experiments in summoning parliaments see Stubbs, *Constitutional History*, vol. II, § 213.

to withdraw from his position, to confirm the charters with certain additional articles. The exact form of those articles is of some importance. According to what in all probability is the authentic version of this *Confirmatio Cartarum*, he granted that the recent exactions, aids and prises should not be made precedents, that no such aids, tasks or prises should be taken for the future without the common consent of the realm, that no tax like that recently set on wool should be taken in future without the common consent of the realm, saving the ancient aids, prises and customs. We have also what seems to be either an imperfect abstract of this document, or else a document which records the demands of the barons. This in after times came to be known as a statute, *Statutum de Tallagio non concedendo*, though as just said in all probability it had no right to this name¹. It goes somewhat further than the authentic version; it contains the word 'tallage' which the authentic version does not, it does not contain a saving clause for the king's ancient rights. 'No tallage or aid shall be taken without the will and consent of all the archbishops, bishops, prelates, earls, knights, burgesses and other free men of the realm.' Tallage, as we have seen, was the name given to an impost set by the king on his own demesne lands—in origin rather a right of the landlord than of the king. Edward, it seems pretty certain, did not consider that he had resigned this right; in 1304 he tallaged his demesne lands. But though this particular mode of raising money may thus have been left open by the letter, if not by the spirit of the law, we may fairly say that after 1295 the imposition of any direct tax without the common consent of the realm was against the very letter of the law. I say of any direct tax, because subsequent events showed that the question of indirect taxes, of customs duties and the like, had not been finally settled. And the common consent of the realm was now no vague phrase; that consent had now its appropriate organ in a parliament of the three estates.

As to the administration of justice by the parliament and the council, we shall speak hereafter, but first a little should be said of the general position of the king. And first as to his title:—

¹ *Select Charters*, pp. 487—98.

The kingship had, I think, by this time become definitely hereditary.

Before the Conquest the English kingship was an elective kingship, but the usage hardening into law was for the great men, the witan, to elect some near kinsman of the dead king. We ought to recollect in this context that the then existing law as to private inheritance was not primogenitary; ordinarily at least a dead man's lands and his goods were partible among all his sons; all primogenitary rules were but slowly worked out long after the Norman Conquest. We learn from Glanvill that even at the end of the twelfth century one of the most elementary questions was still open—A has two sons, B and C, the elder, B, dies during A's lifetime, leaving a son, D; then A dies; who shall inherit, C or D? English law has not yet made up its mind about this very easy problem—for primogeniture is new. So we must not think of private law as setting a model for the succession to the kingship; much rather is it true that the succession to a kingship or other office became the model for the succession to land; primogeniture spreads from office to property. It is long after the Conquest before the notion that the kingship is strictly hereditary becomes firmly rooted. The Conqueror himself could not rely upon hereditary right; he relied rather on gift or devise. Edward had given him the kingdom. I believe that the notion that of right the crown should have gone to Edgar the Ætheling only makes its appearance late in the day. Neither Rufus nor Henry I could rely on hereditary right even according to the notions of the time; both had to seek election and to rely upon the support of the people. Stephen again was compelled to assert a title by election. Probably the succession of Henry the Third did much towards fixing the notion of hereditary right. John has been spoken of by modern writers as an usurper; some at least of his contemporaries treated him as an elected king. Matthew Paris (who died about fifty years afterwards) has put into the mouth of Hubert Walter, Archbishop of Canterbury, a speech made by him before crowning John—and we have other reason for believing that something of the sort was actually said. He distinctly said that no one could claim the crown by hereditary

right—kinship to the late king would give a preference; it is natural and proper to elect a near kinsman, and we have elected Earl John¹. The succession of Henry III, a boy of nine, on the death of his father (there was no one else to crown) is in many ways an important event. From this time forward the kingship is, I think, regarded by contemporaries as definitely hereditary. Then during a period of nearly two centuries the late king has always an obvious heir who succeeds him—Henry III, the three Edwards and Richard II follow each other in strictly correct order, though we have to remember that Edward the Second is deposed. Edward I was the first king who reigned before he was crowned.

Long before the Conquest the English kings had been crowned and anointed. Whether this ceremony was borrowed straight from the Old Testament or became ours by a more roundabout route seems uncertain; but clearly it was not considered to bestow upon the king any indefeasible title to the obedience of his subjects; the kings are easily put aside, and no bishop objects that the Lord's Anointed cannot be removed by earthly power; still a religious sanction is given to the relation between king and people. Also the king swears an oath. The oath taken by Ethelred the Unready we have, and it is in these terms, 'In the name of the Holy Trinity three things do I promise to this Christian people my subjects: first that God's church and all the Christian people of my realm hold true peace; secondly that I forbid all rapine and injustice to men of all conditions; thirdly that I promise and enjoin justice and mercy in all judgments, that the just and merciful God of his everlasting mercy may forgive us all².'

Coronation oaths are of considerable interest, since they throw light on the contemporary conception of the kingship. The oath of Ethelred may be taken as the model of the oaths sworn by king after king in the days after the Conquest. The Conqueror, we are told, swore that he would defend God's holy churches and their rulers, that he would 'rule the whole people with righteousness and royal providence, that he would estab-

¹ *Select Charters*, p. 271.

² Liebermann, *Gesetze der Angelsachsen*, vol. I, p. 217.

lish and hold fast right law, and utterly forbid rapine and unrighteous judgment.' Rufus swore a like oath. The oath of Henry I seems to have been precisely that of Ethelred. It is probable that the oaths of Richard, John and Henry III differed somewhat from this ancient form. They promised to observe peace, to reverence the church and clergy, to administer right justice to the people, to abolish evil laws and customs, and to maintain the good. It is to be regretted that about the oath of Edward I there is some doubt—to be regretted because the oath of Edward II differs in an important manner from that of Henry III—but a French form has been preserved which is possibly that used by Edward I, and it has these words—'and that he will cause to be made in all his judgments equal and right justice with discretion and mercy, and that he will grant to hold the laws and customs of the realm which the people shall have made and chosen (*que les gentes de people averont faitz et eslies*), and will maintain and uphold them and will put out all bad laws and customs¹.' The oath of Edward II is much more definite and precise than anything that has yet come before us. The king is thus catechized by the Archbishop:

Sir, will you grant and keep and by your oath confirm to the people of England the laws and customs granted to them by the ancient kings of England your righteous and godly predecessors, and especially the laws, customs and privileges granted to the clergy and people by the glorious King S. Edward your predecessor? I grant and promise.

Sir, will you keep towards God and holy church and to clergy and people peace and accord in God entirely after your power? I will keep them.

Sir, will you cause to be done in all your judgments equal and right justice and discretion in mercy and truth to your power? I will so do.

Sir, do you grant to hold and keep the laws and righteous customs which the community of your realm shall have chosen (*quas vulgus elegerit—les quiels la communaute de vostre roiaume aura esleu*), and will you defend and strengthen

¹ *Constitutional History*, vol. II, § 179 note.

them to the honour of God to the utmost of your power? I grant and promise¹.

You will observe the promise to confirm the laws of Saint Edward. The Confessor has by this time become a myth—a saint and hero of a golden age, of a good old time; but there are documents going about purporting to give his laws, which, if they contain many things inapplicable to these later days and even unintelligible about wergilds and so forth, contain also some far from pointless tales, as to how the sheriffs were once elected by the people, and the like. But the main interest of the oath centres in the words *leges quas vulgus elegerit*—*les quels la communante de vostre roiaume aura esleu*. Legislation, it is now considered, is the function of the *communitas regni, universitas regni*, the whole body of the realm concentrated in a parliament.

And now what was the king's legal position? I think that we may in the first place say with some certainty that against him the law had no coercive process; there was no legal procedure whereby the king could either be punished or compelled to make redress. This has been denied on the ground that in much later days a certain judge said that he had seen a writ directed to Henry III—a writ beginning *Praecipe Regi Henrico*—a writ of course proceeding theoretically from the king, telling the sheriff to order King Henry to appear in court and answer a plaintiff in an action. But this story is now very generally disbelieved. On the contrary, from Henry III's reign we get both from Bracton and from the Plea Rolls the most positive statements that the king cannot be sued or punished. In this meaning, the maxim that the king can do no wrong is fully admitted. If the king breaks the law then the only remedy is a petition addressed to him praying him that he will give redress. On the other hand, it is by no means admitted that the king is above the law. Bracton who, you will remember, was for twenty years a judge under Henry III, repeats this very positively:—The king is below no man, but he is below God and the law; law makes the king; the king is bound to obey the law, though if

¹ *Constitutional History*, vol. II, § 249.

he break it, his punishment must be left to God¹. Now to a student fresh from Austin's jurisprudence this may seem an absurd statement. You put the dilemma, either the king is sovereign or no; if he be sovereign then he is not legally below the law, his obligation to obey the law is at most a moral obligation; on the other hand if he is below the law, then he is not sovereign, he is below some man or some body of men, he is bound for example to obey the commands of king and parliament, the true sovereign of the realm. This may be a legitimate conclusion if in Austin's way we regard all law as command; but it is very necessary for us to remember that the men of the thirteenth century had no such notion of sovereignty, had not clearly marked off legal as distinct from moral and religious duties, had not therefore conceived that in every state there must be some man or some body of men above all law. And well for us is it that this was so, for had they looked about for some such sovereign man or sovereign body as Austin's theory requires, there can be little doubt that our king would have become an absolute monarch, a true sovereign ruler in Austin's sense—the assembly of prelates and magnates was much too vague a body, and a body much too dependent for its constitution on the king's will to be recognized as the depositary of sovereign power. No, we have to remember that when in the middle of the seventeenth century Hobbes put forward a theory of sovereignty which was substantially that of Bentham and of Austin, this was a new thing, and it shocked mankind. Law had been conceived as existing independently of the will of any ruler, independently even of the will of God; God himself was obedient to law; the most glorious feat of his Omnipotence was to obey law:—so the king, he is below the law, though he is below no man; no man can punish him if he breaks the law, but he must expect God's vengeance.

While we are speaking of this matter of sovereignty, it will be well to remember that our modern theories run counter to the deepest convictions of the Middle Ages—to their whole manner of regarding the relation between church and state.

¹ Bracton, *De Legibus Angliae* (Rolls Series), I, 38; *History of English Law*, vol. I, pp. 160—1, 500—1.

Though they may consist of the same units, though every man may have his place in both organisms, these two bodies are distinct. The state has its king or emperor, its laws, its legislative assemblies, its courts, its judges; the church has its pope, its prelates, its councils, its laws, its courts. That the church is in any sense below the state, no one will maintain; that the state is below the church is a more plausible doctrine; but the general conviction is that the two are independent, that neither derives its authority from the other. Obviously while men think thus, while they more or less consistently act upon this theory, they have no sovereign in Austin's sense; before the Reformation Austin's doctrine was impossible.

But to return. The troubles of Henry's reign, troubles which he brought upon himself by his shiftless faithless policy, give rise to other thoughts. Bracton himself in one place hints that possibly if the king does wrong and refuses justice the *universitas regni* represented by the barons may do justice in the king's name and in the king's court. In the printed text of Bracton's book there is a passage, probably interpolated by some annotator, which goes far beyond this, which declares that the king is not only below God and the law, but below his court, that is to say, below his earls and barons, for the earls (*comites*) are so called because they are the king's fellows (*socii*), and he who has a fellow has a master (*qui habet socium, habet magistrum*); they therefore are bound to set a bridle upon him and constrain him to do right¹. This passage clearly was written during the time of revolt, the revolt which led to the battles of Lewes and of Evesham. The ideal of that revolt was a small council of magnates, chosen by the barons, whom the king would be bound to consult, who, if need be, would exercise the royal powers. That ideal was not realized—happily, I think we may say, for it was an oligarchical ideal. The law was left as it was, as it is at this very moment—that against the king law has no coercive power, it has no punishment for the king, it cannot compel him to make redress—or, as we say, the king can do no wrong. It was left to later ages to work out consistently the other side of our modern doctrine, namely, that though the king can neither be punished nor sued,

¹ Bracton, *De Legibus Angliae*, 1, 268.

no other person, no servant of the king, is protected against the ordinary legal consequences of an unlawful act by the king's command.

The power of deposing a king is a somewhat different matter. The next century presents us with two cases of deposition, that of Edward II and that of Richard II. There was talk of deposing John, there was talk of deposing Henry III. Apparently the common opinion of the time was quite prepared for the deposition of a king who would not rule according to law—any notion of divine hereditary right not to be set aside by any earthly power does not belong to this age. But the only precedents for deposing a king belonged to an already remote time, and in all probability were but little known. The events of 1327 and 1399, though they prove clearly enough that the nation saw no harm in setting aside a bad or incompetent king, prove also that there was no legal machinery for doing this. We shall see this more clearly when these events come before us hereafter. The idea current in the thirteenth century is not so much that of a power to try your king and punish him, as that of a right of revolt, a right to make war upon your king. It is a feudal idea and a dangerous one; the vassal who cannot get justice out of his lord may renounce his fealty and his homage, may defy his lord, may, that is, renounce his affiance, his fealty. This is not the remedy of an oppressed nation, it is the remedy of an oppressed vassal.

This would naturally lead us to speak of feudalism as a political or anti-political force; that is a subject which we will still postpone; but a little more may here be added about the theory of the kingship. Already in Henry III's reign it is the doctrine of the royal judges, who would not be disposed to narrow unduly the scope of their master's powers, that the king cannot make laws without the consent of his prelates and barons. This is brought out by the treatment which a famous passage in the Institutes receives at their hands—*sed et quod principi placuit legis habet vigorem*. Now under Henry II, the writer whom we call Glanvill does, as it seems to me, hint that these words are true of the king of England; his words however are not very plain, and it is possible that

he did not wish them to be very plain; however he brings out clearly the matter of fact that Henry legislates with the counsel of the magnates, *consilio procerum*¹. In Bracton we may see a distinct step—he cites the words of the Institutes, but so as to give them a quite new meaning; this I take to be a bit of deliberate perverseness, something not far removed from a jest; he knows that the words in their proper sense are not true of King Henry—the law has made him king, it is by virtue of the law that he reigns, and this law sets limits to the *placita principis*². Undoubtedly, however, during Henry III's long reign a great deal of what we should call law making was done without the assent of the national assembly. The common law grew very rapidly; it could grow very rapidly because the opinions of the time conceded to the king or to the king and his selected councillors a considerable power of making new remedies—new modes of litigation, new forms of action. It is not at once seen that to give new remedies is often enough to alter the substantive law of the land. Gradually however this is seen, and complaints against these new actions become loud, chiefly because they draw away litigants from the feudal courts and from the ecclesiastical courts. Bracton writing towards the end of the reign has left us a curious transitional doctrine. The king can make new writs, new forms of action; in strictness such a writ requires the consent of the magnates, at least if it concerns land (for land is the subject of the feudal jurisdictions); still the consent of the magnates may be taken for granted; they consent if they do not expressly dissent; and after all it is the king's duty to find a remedy for every wrong—his solemn sworn duty. Such a theory could hardly be permanent, and one of the definite results attained by what we call the Barons' War was that a limit was set to the king's writ-making power. In Edward's day we find it admitted that new writs cannot be made without the action of the national assembly—they must

¹ *Tractatus de Legibus Angliæ. Prologus.* “Leges namque Anglicanas, licet non scriptas, Leges appellari non videtur absurdum (cum hoc ipsum lex fit ‘quod principi placet, legis habet vigorem’) eas scilicet, quas super dubiis in consilio definiendis, procerum quidem consilio, et principis accidente autoritate, constat esse promulgatas.”

² *De Legibus Angliæ*, I, 38.

be sanctioned by statute; indeed so strict has this rule become that in 1285 it requires a statute to permit the clerks in the King's Chancery to vary the old writs slightly so as to fit new cases as they arise, but only new cases which fall under rules of law already established and which require remedies which are already given. Henceforth the sphere for judge-made law is hemmed in by the existing remedies, the writs that have already been made; to introduce a new form of action requires a statute. Henceforth for nearly two centuries the growth of unenacted law is very slow indeed.

E. Administration of Justice.

This brings us to the administration of justice. We have already had occasion to speak of courts of various kinds. Some repetition is unavoidable. The further back we trace our history the more impossible is it for us to draw strict lines of demarcation between the various functions of the state: the same institution is a legislative assembly, a governmental council and a court of law; this is true of the witenagemot; it is true, though perhaps less true of the Curia of the Norman kings; traces of its truth are left in our own time; our highest court of law is to this day an assembly of prelates and nobles, of lords spiritual and temporal in parliament assembled; everywhere, as we pass from the ancient to the modern, we see what the fashionable philosophy calls differentiation. We will now take a brief review of the whole system of law courts as it stands in Edward the First's day.

There are we may say courts of four great kinds. (1) There are the very ancient courts of the shire and the hundred; these we may call popular courts, or still better, communal courts—they are courts which in time past have been constituted by the free men of the district; they are courts which are now constituted by the freeholders of the district: but a good many of the hundred courts have fallen into private hands. (2) There are the feudal courts, courts which have their origin in tenure, in the relation between man and lord; there is the manorial court baron for the freehold tenants of the manor, in which they sit as judges; there is the hall-moot

or customary court of the manor for the tenants in villeinage, in which (at least according to the theory of later times) the lord's steward is the only judge. (3) There are the king's own central courts. (4) There are the courts held by the king's itinerant justices—visitatorial courts, we may for the moment call them. We leave out of sight the ecclesiastical courts, or courts Christian, though these were important courts for the laity as well as for the clergy.

Now the preliminary notions with which we ought to start are, I think, these:—(a) The communal courts of the shire and the hundred are, to start with, fully competent courts for all causes criminal as well as civil. The kings of the pre-Conquest period had apparently no desire to draw away justice from these courts. Over and over again they ordain that no one is to bring his suit before the king before justice has failed him in the hundred and the shire. We must not think of the witenagemot even as a court of appeal—to introduce the notion of an appeal from court to court is to introduce a far too modern conception. The suitor who comes before the king comes there not to get a mistake corrected but to lodge a complaint against his judges; they have wilfully denied him justice.

(b) By the side of the ancient courts there have grown up the feudal courts. This process had in all probability been going on for a century before the Conquest. After the Conquest the principle seems admitted that any lord who has tenants may, if he can, hold a court for them. In this disputes between tenants are adjudged; in particular if land is in dispute and both parties admit that the land is holden of this lord, then his court is the proper tribunal. A great deal of jurisdiction has thus been taken away from the communal courts, but jurisdiction of a civil kind. Mere tenure cannot give a criminal jurisdiction; if the lord has this, he has it by virtue of some grant from the king.

(c) After the Norman Conquest the king's court has, we may say, three main functions: (i) as of old it is a court of last resort in case of default of justice, (ii) on feudal principle it is a court for the tenants in chief, (iii) it is admitted that there are certain causes in which the king has a special interest

and which must come either before his own court or before a court held by some officer of his:—these are the pleas of the crown.

We have now to watch the growth of this royal jurisdiction and will begin by speaking of the pleas of the crown.

Already before the Conquest we find that there are certain criminal cases in which the king is conceived to have a special interest. Thus in the Laws of Canute it is said ‘These are the rights which the king has over all men in Wessex—*mund-bryce*, *hâm-sôcne*, *forstal*, *flymena-fyrmðe* and *fyrð-wite*¹.’ Apparently in case of any of these crimes no lord may presume to exercise jurisdiction—unless it has been expressly granted to him; such cases must come before the king, or his officer the sheriff, and the consequent forfeitures are specially the king’s. A word as to the nature of these crimes:—*mund-bryce* is breach of the king’s special peace or protection, this as we shall soon see becomes a matter of the utmost moment; *hâm-sôcne* is housebreaking, the seeking of a man in his house; *forstal* seems to mean ambush; *flymena-fyrmðe* the receipt of outlaws; *fyrð-wite* the fine for neglecting the summons to the army. In these cases, it is conceived there is something more than ordinary crime, e.g. homicide or theft, there is some injury to the king, some attack upon his own peculiar rights.

The next list of pleas of the crown that we get is found in the *Leges Henrici Primi* (1108–18, § 10). It is much longer and so instructive that I will translate it: ‘Breach of the king’s peace given by his hand or writ; danegeld; contempt of his writs or precepts; death or injury done to his servants; treason and breach of fealty; every contempt or evil word against him; [castle building—*castellatio trium scannorum*;] outlawry; theft punishable with death; murder; counterfeiting his money; arson; *hamsoken*; *forestal*; *fyrðwite*; *flymena-fyrmðe*; premeditated assault; robbery; streetbreach; taking the king’s land or money; treasure trove; shipwreck; waif of the sea; rape; forests; reliefs of barons; fighting in the king’s house or household; breach of peace in the army; neglecting to repair castles or bridges; neglecting a summons to the

¹ Liebermann, *Gesetze der Angelsachsen*, vol. 1, p. 317.

army; receiving an excommunicate or outlaw; breach of surety; flight in battle; unjust judgment; default of justice; perverting the king's law¹. It is a most disorderly list. The writer has apparently strung together all cases in which either in ancient or modern times the king has asserted a special interest. Observe how criminal cases are mixed up with the king's fiscal rights—by fiscal rights I mean such rights as that to treasure trove, to shipwreck and goods thrown up by the sea. This is very instructive; one of the chief motives that the king has for amplifying his rights is the want of money; the criminal is regarded as a source of income. It will strike you that by a little ingenuity on the part of royal judges almost all criminal cases and very many civil cases also can be brought within the terms of this comprehensive list. But you will further observe that no such generalization has yet been made, it is not yet said that all crime, or all serious crime, or all acts of violence are causes for royal cognizance.

There is one term, however, which occurs in both these lists which can be so extended as to cover a very large space—that is the *mund-bryce* of Canute's laws, which in the *Leges Henrici* appears as *infortio pacis regiae per manum vel breve datum*. Let us go back a little. The idea of law is from the first very closely connected with the idea of peace—he who breaks the peace, puts himself outside the law, he is outlaw. But besides the general peace which exists at all times and in all places, and which according to ancient ideas is the peace of the nation rather than of the king, every man has his own special peace and if you break that you injure him. Thus if you slay A in B's house, not only must you pay A's price or wergild to his kinsfolk, but you have broken B's peace and you will owe B a sum of money, the amount of which will vary with B's rank—you have broken B's peace or *mund*; the *mund* of an archbishop is worth so much, that of an ealdorman so much, and so forth. Like other men the king has his peace. In course of time, we may say, the king's peace devours all other peace—but that has not been effected until near the end of the twelfth century. In the *Leges Edwardi Confessoris* (§ 12) which represent the law of the first half of the century,

¹ Liebermann, *Gesetze der Angelsachsen*, vol. 1, p. 556.

the king's peace covers but certain times, places, and persons. *Pax Regis multiplex est*—the king's peace is manifold. First there is that which he gives with his own hand. Then there is the peace of his coronation day, and this extends eight days. Then the peace of the three great festivals, Christmas, Easter, Pentecost: each endures for eight days. Then there is the peace of the four great highways—the four ancient Roman roads which run through England. To commit a crime in one of these peaces is to offend directly against the king.

Before the end of the century there has been a great change, a great simplification; apparently it has been effected thus:—Under the Norman kings, the mode of bringing a criminal to justice was called an appeal (*appellum*); this word is not used in our modern way to imply the going from one court to a superior court—but means an accusation of crime brought by the person who has been wronged—the person, e.g., whose goods have been stolen or who has been wounded. Well, the king's justices seem to have allowed any appellor to make use of the words 'in the king's peace' whenever he pleased, and did not allow the appellee to take exception to these words—did not allow him to urge that though he might have committed theft or homicide still he had not broken the king's peace, since the deed was not done against a person, or at a time or place which was covered by the king's peace. Fictions of this kind are very common in our legal history, they are the means whereby the courts amplify their jurisdiction. Any deed of violence then, any use of criminal force, can be converted into a breach of the king's peace and be brought within the cognizance of the king's own court.

Further, under Henry II we find a new criminal procedure growing up by the side of the appeal, once a specially royal procedure—this is the procedure by way of presentment or indictment. Under the Assize of Clarendon royal justices are sent throughout England, to inquire by the oaths of the neighbours of all robberies, and other violent misdeeds; those who are accused, presented, indicted by the sworn testimony of the neighbours, by the juries of the hundreds and the vills, are sent to the ordeal. This is an immense step in the history of criminal law. A crime is no longer regarded as a matter

merely between the criminal and those who have directly suffered by his crime—it is a wrong against the nation, and the king as the nation's representative. This procedure by indictment the king keeps in his own hands; it is a specially royal procedure; those who are thus accused of crime must be brought before the king's own justices.

A parallel movement, the details of which are as yet very obscure, has been giving to all the graver crimes the character of felony¹. The origin and original meaning of the word are disputed, but the best authorities now tell us that it is Celtic and carries at first the meaning of baseness; it is said to be connected with the Latin *fallere*, and our verb *to fail*. Be that as it may, two things seem fairly clear, (1) that the word came to us from France with the Normans, (2) that it then meant the specifically feudal crime, the most heinous of all crimes in the opinion of that age, the betrayal of one's lord, or treachery against one's lord. For some time it is thus used in England; thus in the *Leges Henrici* felony is still one crime among many. We observe two things about it, that it is a crime punished by death, and that it is a crime which causes an escheat of the land which the criminal holds. But before the end of the twelfth century we find that this word has lost its specific signification, that it has a wide meaning. Whenever an appeal is made, be it for homicide, or wounding, or theft, the appellor always states that it was done not only *in pace domini Regis*, but also *in feloniam*. We even find that these words are absolutely essential; if they are not used the appeal is null. Here again, I take it, fiction has been at work—the judges have encouraged the use of this term, and have not allowed accused persons to protest that though there might be homicide, wounding or robbery, still there was no felony. Two motives made for this:—the old system of money compositions was breaking down; at the beginning of the twelfth century it is still in existence, though capital punishment has been gaining ground; at the end of the century it has disappeared—every crime of great gravity has become a capital offence. Secondly, the principle that felony is a cause of

¹ The subject is treated at length in the *History of English Law*, vol. I, pp. 303—5, vol. II, pp. 462—511.

escheat, made it very desirable in the king's eyes, and the eyes of the lords, that as many crimes as possible should be brought under this denomination. Thus all the graver crimes became felonies. We never get to a definition of felony; but we do get to a list of felonies.

I think we may say that from the beginning of the thirteenth century onwards, all causes that are regarded as criminal are pleas of the crown, *placita coronae*, save some petty offences which are still punished in the local courts, but even over these the sheriff is now regarded as exercising a royal jurisdiction. To this point we shall return once more; we have meanwhile to watch the growth of royal jurisdiction in civil causes.

This is by no means a simple matter; the process is very slow, and indeed even in the present century our civil procedure bore witness of a time when the king's court had not yet taken upon itself to act as a court of first instance in the ordinary disputes of ordinary people. We may, however, indicate six principles which serve to bring justice to the king's court.

(1) From the outset it is a court to which one may go, for default of justice in lower courts. Under the Norman kings we find that frequently a litigant, who in the ordinary course is going to sue in the court of a feudal lord, will go to the king in the first instance, and procure a writ, a mandate directing the lord, ordering him to do justice in his court to the applicant, and adding a threat, *quod nisi feceris vicecomes meus faciet*—if you won't do it my sheriff will—the action will be removed out of your court into the county court, and thence it can be removed into the king's own court. This is a writ *de recto tenendo*, a writ of right.

(2) Henry II must, it would seem, have ordained that no action for freehold land shall be begun in a manorial court without such a writ. I say he must have ordained it: we have no direct evidence of this: but Glanvill lays down the principle in the broadest terms, no one need answer for his freehold without the king's writ, a writ directing the lord to do right—and we can say pretty positively that this was not law before Henry's day. You will notice that it is a serious invasion on feudal principles; when freehold is at stake, the

lord cannot hold his court or do justice until the king sets him in motion—the jurisdiction may spring out of tenure, but it is not beyond royal control. The excuse for such an interference may lie in that royal protection of possession of which we are soon to speak.

(3) In an action for land in a manorial court begun by writ of right, Henry II by some ordinance, the words of which have not come down to us but which was known as the grand assize, enabled the holder of the land to refuse trial by battle and to put himself upon the oath of a body of twelve neighbours sworn to declare which of the two parties had the greater right to the land. This was called putting oneself on the grand assize; and the body of sworn neighbours was known as the grand assize.

(4) Henry II, as we have before remarked, took seisin, possession as distinct from ownership, under his special protection—men who consider that land is unjustly withheld from them are not to help themselves; there is to be no disseisin without a judgment. He who is thus disseised shall be put back into possession without any question as to his title. This protection of possession is, I think, closely connected with that extension of the king's peace which we have been watching. He who takes upon himself to eject another from his freehold, breaks the peace, and the peace is the king's. This possessory procedure the king keeps in his own hands—it is a royal matter, the feudal courts have nothing to do with it. Thus there grows up a large class of actions (the possessory assizes) relating to land, which are beyond the cognizance of any but the king's justices, and these justices take good care that the limits of these actions shall not be narrow; perhaps indeed they are not always very careful to draw the line between disputes about possession which belong to them, and disputes about ownership which should go to the royal courts.

(5) If we turn back to the list of royal rights contained in the *Leges Henrici*, we find among them—*placitum brevium vel praeceptorum ejus contemptorum*—pleas touching the contempt of his writs or precepts. Now here is an idea of which great use can be made: B detains from A land or goods or

owes A a debt; this may not be a case for the royal jurisdiction—but suppose that the king issues a writ or precept ordering B to give up the land or goods or to pay the debt, and B disobeys this order, then at once the royal jurisdiction is attracted to the case. The king's chancellor begins to issue such writs with a liberal hand. A writ is sent to the sheriff in such words as these: Command B (*Praecipe* B) that justly and without delay he give up to A the land or the chattel or the money which, as A says, he unjustly detains from him, and if he will not do so command him to be before our court on such a day to answer why he hath not done it. Thus the dispute between A and B is brought within the sphere of the king's justice; if B is in the wrong he has been guilty of contemning the king's writ. Such writs in Henry II's time are freely sold to litigants: but this is somewhat too high-handed a proceeding to be stood, for in the case of land being thus demanded, the manorial courts are deprived of their legitimate jurisdiction. So we find that one of the concessions extorted from John by Magna Carta is this: The writ called *Praecipe* shall not be issued for the future, so as to deprive a free man of his court, i.e. so as to deprive the lord of the manor of cases which ought to come to his court, his court being one of his sources of income¹. To a certain extent in cases of land this puts a check on the acquisitiveness of the royal court. But even as regards land, it is evaded in many different ways, in particular, by an extension of the possessory actions which make them serve the purpose of proprietary actions. As regards chattels and debts the king has a freer hand.

(6) The notion of the king's peace is by no means exhausted when it has comprehended the whole field of criminal law: mere civil wrongs, 'torts' as we call them, can be brought within it—a mere wrongful step upon your land, a mere wrongful touch to your goods or to your person can be regarded as a breach of the peace; any wrongful application of force, however slight, can be said to be made *vi et armis et contra pacem domini Regis*: in such cases there may be no felony and no intention to do what is wrong—I may believe the goods to be mine when they are yours, and carry them off

¹ M. C. c. 34. McKechnie, pp. 405—13.

in that belief ; still this may be called a breach of the peace. Hence in the thirteenth century a large class of writs grows up known as writs of trespass ; for a long time the procedure is regarded as half-civil, half-criminal: the vanquished defendant has not only to pay damages to the plaintiff, he has to pay a fine to the king for the breach of the peace. Gradually (but this is not until the end of the Middle Ages) the fine becomes an unreality : actions of trespass are regarded as purely civil actions—and in course of time this form of action and forms derived out of it are made to do duty instead of all, or almost all, the other forms.

Armed with these elastic principles it was easy for the king's courts to amplify their province. By the beginning of Edward's reign we may, I think, say that all serious obstacles to the royal jurisdiction had been removed. The royal courts had in one way and another become courts of first instance for almost all litigation. But the extremely active legislation of his reign and the growth of parliament set a limit to the invention of new actions. It was now recognized that there were a certain number of actions to which no addition could be made except by statute. There were a certain number of writs in the royal Chancery ; these were at the disposal of every subject ; they were to be had on payment of the customary fees ; they could not be denied ; by these writs actions were begun, were originated ; they were *brevia originalia*, original writs. A certain power of varying the stereotyped forms was allowed by the Statute of Westminster II (1285), and of this in course of time some good use was made ; but from Edward's day down to the middle of the present century the development of common law was fettered by this system of original writs—writs which had been devised for the purpose of bringing before the king's court litigation which in more ancient times would have gone to other tribunals.

But the king's court could not have succeeded in thus extending the sphere of its activity if it had not been able to offer to suitors advantages which they could not get elsewhere. Royal justice was a good article—that is to say, a masterful thing not to be resisted. There were many processes which the king could give which were not to be had in lower courts.

To describe some of these would take us too deeply into the technicalities of legislation. But there is one royal boon, *regale beneficium*, as Glanvill calls it, which has had a most important influence on the whole of our national history—trial by jury. In order to understand its history we must say a little about these modes of trial and of proof which in course of time gave way before it.

Now the first thing to note about the procedure in the courts before the Conquest is that proof comes after judgment. This may sound like a paradox. It may seem to us that the judgment must be the outcome of the proof. By proof the judges are convinced, and being convinced give judgment according to their conviction. But the old procedure does not accord with this to us very natural notion. Suppose two persons are litigating—A charges B with having done something unlawful—we find that the judgment takes this form, that it is for A (or as the case may be for B) to prove his case. The judgment decides who is to prove, what proof he is to produce—and what will be the consequence of his succeeding or failing to give the requisite proof. This matter becomes clearer when we consider the known means of proof. They are oaths and ordeals—and of oaths again there are several different kinds: there is the simple unsupported oath of the party, there is the oath of the party supported by compurgators or oath-helpers, and there is the oath of witnesses. We must look at these modes of proof a little more closely.

In some few cases A having brought some charge against B, it will be adjudged that B do prove his case simply by his own oath. This being so, B has to swear solemnly that he has not done that which is alleged against him. If he can do this then the charge against him fails. This may seem a very easy way of meeting an accusation, and such probably it was, and in but few cases would so simple a proof as this have been sufficient. Still even in this ceremony it was possible to fail: the swearer had to use exactly the right words, and a slip would be fatal to his cause. I have said that we have no text-book of Anglo-Saxon law. But one of the things that looks most like a text-book is a brief collection of the oaths to be sworn on different occasions. They are very formal and, as it

seems, half-poetical. Probably the utmost accuracy was required of the swearer. Besides we should remember that an oath was very sacred. One may hope that in the course of history the respect for truth increases—but just for this reason, as it seems to me, the respect for an oath as such diminishes. We think that we ought to tell the truth, that this obligation is so strict that no adjuration, no imprecation can make it stricter. To reverence an oath as an oath is now the sign of a low morality. Not so in old time:—the appeal to God makes all the difference; men will not forswear themselves though they will freely lie; between mere lying and the false oath there is a great gap. But generally a defendant was not allowed to meet a charge in a fashion quite so simple; he was required to swear, but to swear with compurgators. Now a compurgator or an oath-helper is a person who comes to support the oath of another by his own. For instance A charges B with a debt; it is adjudged that B do go to the proof with twelve oath-helpers. This being so then B will first swear in denial of the charge, and then his compurgators will swear that they believe his oath—‘By God the oath is clean and unperjured that B hath sworn’—they swear not directly that B does not owe the money, they swear to a belief in his oath. Now this process of compurgation is found not only in Anglo-Saxon law, but in all the kindred laws of the German and Scandinavian nations, nor in these only, for the Welsh laws about compurgation are particularly full and particularly interesting. Occasionally we come across a requirement that the oath-helpers shall be of kin to the principal swearer, and this has led to some interesting speculations as to the origin of this procedure. Obviously if what were wanted was the testimony of impartial persons to the truthful character of the accused, one would not naturally seek this from his next of kin, who will very naturally stand by their kinsman. In days when the bond of blood-relationship was felt as very strict, when men were expected to espouse the quarrel and avenge the death of their kinsman, they can hardly have been thought the best witnesses to his honesty. It has therefore been thought by some (and if we may refer to the Welsh laws they will fully bear this out) that compurga-

tion takes us back to a time when the family is an important unit in the legal system. Any charge which primarily affects an individual is secondarily a charge against the family to which he belongs:—that family is bound to make compensation for the wrongs that he does, and even to pay his debts if he will not pay them. But if this theory be true—and I think that there is much in its favour—our ancestors had passed out of this primitive condition before they appear in the light of clear history: the family was no longer so important, the state had a direct hold on the individual. It is but rarely that we hear of kinsmen as compurgators. Generally it is only required that the swearer shall produce good and lawful men to the requisite number. That number varies from case to case—sometimes it is as high as 48; but 12 is a very common number—a fatally common number, for it misleads the unwary into seeing a jury, where in truth there are but compurgators. But the system is very elaborate. For instance we find a sort of tariff of oaths—the oath of a thane is worth the oaths of six ceorls, and so forth. Again in cases of grave suspicion the swearer has to repeat the oath over and over again with different batches of compurgators. In comparatively recent times, the thirteenth and fourteenth centuries, compurgation still flourished in the city of London, which had obtained a chartered immunity from legal reforms:—we read how the Londoner may rebut a charge even of murder by an oath sworn with 36 compurgators—how, in another case, he must swear nine times before nine altars in nine churches. Then again in the Anglo-Saxon days we find that occasionally the judge names a number of men from among whom the defendant has to select his compurgators. This seems the outcome of an attempt to make the procedure more rational, to obtain impartial testimony. But normally the person who has to swear chooses his own compurgators, and if he produces good and lawful men, i.e. free men who have not forfeited their credibility by crime, this is enough. Then again the compurgatory oath is sometimes made more or less difficult by the requirement or non-requirement of perfect verbal accuracy—sometimes it is sworn *in verborum observanciis*, sometimes not—that is, sometimes a slip will be fatal,

sometimes not. The oath with compurgators, made more or less onerous in these various ways according to an elaborate system of rules, seems the general proof of Anglo-Saxon law—both in the cases which we should call civil, and in those which we should call criminal. The man of unblemished reputation is in general entitled to clear himself of a charge in this manner: the man who has been repeatedly accused or who cannot find compurgators must go to the ordeal.

But the law knows of other witnesses besides compurgators—or if we do not choose to consider these compurgators as witnesses, then we must say that it knows of witnesses as distinguished from compurgators. But these witnesses, like compurgators, do not appear until after judgment—they do not come to persuade the court to give this or that judgment—they come there to fulfil the judgment already given to the effect that the plaintiff, or (as the case may be) defendant, do prove his case with witnesses. It has been adjudged that A do prove his assertion by witnesses: A brings his witnesses; they do not come to be examined; they come to swear, to swear up to a particular formula, to swear up to A's assertion—this is all that is required of them. They must be good and lawful men—but if they are this, then B cannot object to them, cannot question them; if he thinks them forsworn, then his remedy, if any, is against them—he must charge them with perjury. Their evidence is not put before the court as material for a judgment; judgment has been already given. To decide a dispute by weighing testimony, by cross-examining witnesses, by setting evidence against evidence and unravelling facts—this is modern; the ancient mode is to fall back at once on the supernatural, to allow one party or the other to appeal to Heaven—to leave the rest to 'whatever gods there be.' This 'formal one-sided witness procedure' (that is the best phrase that I can find for it) is not so common in Anglo-Saxon law as the procedure by compurgation—but there are occasions for it. For instance many transactions such as sales of goods are required to be completed in the presence of witnesses and official witnesses. This is part of the police system. The typical action of Anglo-Saxon law seems the action to recover stolen cattle—doubtless, cattle

lifting was an extremely common form of wrong-doing—and many of the dooms are concerned with its prevention. A man who buys cattle must buy them in the presence of the official witnesses chosen for each hundred and borough, otherwise should he buy from one who is a thief, he is like to find himself treated as a thief. And there are other purposes for which witnesses may be produced ; but it seems that there is no power to compel a person to come and give evidence unless at the time when the event took place he was solemnly called to bear witness of it. If something happens and you think that hereafter you may need the testimony of the bystanders, you must then and there call upon them to witness the fact, otherwise you will have no power of compelling them to come to court and prove your case. But the matter on which I would chiefly insist is the one-sided character of procedure, because here is the gulf—the, as it seems, insurmountable gulf—between the Anglo-Saxon witnesses and the jurors of Henry the Second's reign. The witness is called in by the party—the party to whom the proof has been awarded—to swear up to his case; the juror is called in by the sheriff or by the court to swear to the truth whatever the truth may be.

The ordeal was used chiefly, though not, I think, exclusively, in the case of the graver charges, criminal charges as we should call them. This of course is a direct and open appeal to the supernatural, the case is too hard for man, so it is left to the judgment of God. There seems little doubt that ordeals were used by our forefathers in the days of their heathenry, though unfortunately almost all our evidence comes from a time when they have become Christian ceremonies practised under the sanction of the church¹. Four ordeals are known to Anglo-Saxon law; the ordeal of hot iron: the accused is required to carry hot iron in his hand for nine steps, his hand is then sealed up and the seal broken on the third day, if the hand has festered then he is guilty, if not, innocent; the ordeal of hot water: the accused is required to plunge his hand into hot water, if the ordeal is simple, to the wrist, if threefold, then to the cubit; the ordeal of cold water: the accused is thrown into water, if he sinks he is innocent, if he

¹ Liebermann, *Gesetze der Angelsachsen*, pp. 401—29.

floats he is guilty; the ordeal of the morsel: a piece of bread or of cheese an ounce in weight is given to the accused, having been solemnly adjured to stick in his throat if he is guilty. I do not wish to dwell on these antiquities, which are sufficiently described in many accessible books¹. Certainly it is very difficult to understand how this system worked in practice.

One form of the ordeal seems to have been unused by the Anglo-Saxons, namely, trial by battle, the judicial duel. This is a very curious fact, for I believe that in all the kindred systems of law the duel has a place. Perhaps we may attribute this to the action of the church, for against this form of ordeal the church very early set its face, and in England the church was very strong, popular and national. At any rate this seems the fact—there is no mention of trial by battle in the Anglo-Saxon laws, and I believe no evidence that any such trial took place in England before the Norman Conquest. Besides we have an ordinance, I believe, an undoubtedly genuine ordinance of William the Conqueror, which treats the duel as the form of trial appropriate for Normans. Now this probably constituted the one great difference between the Norman and the Anglo-Saxon procedure. Compurgation and the other ordeals are common to both systems, but in the Norman many questions are decided by battle, while the place of the duel in the Anglo-Saxon system is filled partly by the other ordeals, partly by those very elaborate forms of compurgation of which I have spoken. I speak of trial by battle as an ordeal, and this it seems to be. In theory it is not an appeal to brute force, but an appeal to Heaven.

We cannot find the germ of trial by jury either in the Anglo-Saxon procedure, or in the ordinary procedure of the Norman courts. Still the germ must be found somewhere, and the research of these last days has gradually been concentrating itself on one particular point, the prerogative procedure of the court of the Frankish kings.

I cannot speak of this matter with any minuteness. It must suffice that the Franks had occupied provinces of the Roman Empire far more thoroughly Romanized than our own

¹ References may be found in what is now the best and most accessible of these books, *The History of English Law*, vol. II, p. 596.

country; that a powerful monarchy grew up, that the Frankish king became Roman Emperor. Already I have said something about the growth of kingship and kingly power in this country. Abroad the same process went on, but much more rapidly, fostered by imperial Roman traditions. The Frankish king seems to have inherited many of the powers of the Roman government, and among these many procedural prerogatives; the formal procedure of the old Germanic courts did not apply to him, he could dispense with it, could for his own purposes make use of speedier and more stringent processes. We see something of the same kind in the England of a much later day. In litigation the king enjoys all manner of advantages. What is more we find phrases used of the Frank king's court which incline us to say that it was in the old English sense a Court of Equity, as well as of Law—that is to say, when compared with the popular communal courts it seems unhampered, untrammelled by procedural rules, it can devise new expedients for doing justice, for eliciting the truth. Then we find further that these Frankish kings and emperors to protect their own rights, the rights of the crown, make use of a means of getting at the truth not employed by the older courts. For instance, there being question as to some land whether it be demesne of the crown or no, an order will be given to a public officer to inquire into this by the oaths of the neighbours. It seems that such *inquisitiones* (for such is the term usually employed) were frequently ordered for the ascertainment of crown rights. The crown thus places itself outside the ordinary formal procedure; for its own purposes it will make a short cut to the truth¹. Nor is this all: these Frankish kings assume the power of granting to others the privileges which they themselves enjoy—in particular in granting to the religious houses which they have founded, an immunity from the formal procedure of the ancient courts:—if the title of the monastery to its lands be called in question, then the matter is to be tried by a royal judge; there is to be

¹ We are here forcibly reminded of our own inquests of office—the sheriff or the escheator summoning a jury to testify whether someone has died without an heir, or has forfeited his land, in order that the rights of the crown may be known and the land seised into the king's hand. F. W. M.

no judicial combat; the judge is to summon the neighbours, and by their oath the question is to be decided. Here seems to be just what we want as the germ of trial by jury. A body of neighbours is summoned by a public officer to testify the truth, be the truth what it may, about facts and rights presumably within their knowledge. Lastly, a somewhat similar process is used for the detection of crimes. Procedure by private accusation is found insufficient for the peace of the realm, and the king finds himself strong enough to order that the men of a district be sworn to accuse before royal officers, those who have been guilty of crime. These royal officers (*missi* they are called) sent out to receive such accusations and to hold inquisitions, remind us strongly of our own itinerant justices, and indeed it seems very likely that our *justiciarii itinerantes* are in spirit the direct descendants of the Frankish *missi*.

It is now very generally allowed that this is the quarter in which we must look for the first rudiments of trial by jury, the prerogative procedure of the courts of the Frankish kings and emperors. But it must at first sight seem a very strange thing that an institution, which in its origin was peculiarly Frankish, became in course of time distinctively English. In France this inquisition procedure perished, transplanted to England it grew and flourished, and became that trial by jury which after long centuries Frenchmen introduced into modern France as a foreign, an English institution. How was this?

The Frankish Empire, let us remember, went to wreck and ruin and feudal anarchy. But in one corner of its domain there settled a race whose distinguishing characteristic seems to have been a wonderful power of adapting itself to circumstances, of absorbing into its own life the best and strongest institutions of whatever race it conquered—Frankish, Italian, or English. The Normans conquered England; they had previously conquered Normandy: for 150 years or thereabouts they had been settled on Frankish territory. And in their civilization they had become Frankish; they had thrown aside their heathenry and become Christians; they had forgotten their Scandinavian tongue and learned the Romance language of those whom they conquered. The legal

history of Normandy during those 150 years, from 912 to 1066, is particularly obscure, but it seems sufficiently proved that the Norman dukes assumed and exercised that power of ordering inquisitions which had been wielded by the Frankish kings, of establishing a special procedure by way of inquest for the ascertainment and protection of ducal rights, and of the rights of those to whom the duke had granted a special immunity from the formal procedure of the ordinary courts. We find, for example, ducal charters giving such privileges to religious houses, very similar to the charters of the Frankish kings.

Then so soon as England is conquered we find the Norman dukes, now kings of England, ordering inquisitions within their new domains. One of these is very famous, for it is the Domesday inquest. The king sent out barons who made the great survey on the oath of the sheriff, and all the barons and Norman landowners of the shire, and of the priest, reeve and six villagers (*villani*) from every township. This was a fiscal inquisition on a very large scale; the prerogative procedure whereby the Frankish kings had protected the rights of the crown, ascertained the limits of the royal domain and so forth, was now applied to the whole of a conquered kingdom. This is a splendid and notorious instance, but it does not stand alone, and we find the Norman kings ordering inquisitions not merely to protect their own rights, but also to protect the rights of those who acquired this privilege—acquired it for the most part for valuable consideration, for such privileges are vendible. Thus we have a writ of the Conqueror himself, ordering an inquisition in favour of the church of Ely; a number of Englishmen who knew the state of the lands in question in the days of Edward the Confessor are to be chosen and are to swear what they know¹. There are other instances of such writs.

Hitherto, whether we have looked at the Frank empire, the Norman duchy or the English kingdom, the inquisition by the oath of neighbours has appeared as something exceptional—a royal or ducal privilege, no part of the ordinary procedure of ordinary litigation: indeed it is rather a fiscal or

¹ *Liber Eliensis*, 1, 256.

administrative, than a judicial institution. But in Normandy and in England it became a part of the ordinary procedure open to every litigant. This no doubt was the work of Henry II; of this we have ample evidence, though we have not in all cases the text of the ordinances whereby the work was accomplished. Let us see the various forms which the inquisition or inquest now assumes.

(1) In the first place we have the grand assize. When A demands land from B, B instead of fighting or obtaining a champion to fight for him, may put himself upon the grand assize of our lord the king. Four knights are then chosen by the parties and they elect twelve knights, who come before the king's justices to testify whether A or B hath the greater right to this land. These jurors or 'recognitors' you see are called in not as judges of fact who are to hear the evidence of witnesses, but as witnesses, and a strict line between questions of fact and questions of law has not yet been drawn—they speak as to rights, not merely as to facts.

Glanvill in a memorable passage brings out the character, the royal origin, of this new procedure¹. The grand assize, he says, is a royal boon by which wholesome provision has been made for the lives of men and the integrity of the state, so that in maintaining their right to the possession of their freeholds the suitors may not be exposed to the doubtful issue of trial by battle. This institution (he adds) proceeds from the highest equity, for the right which after long delay can scarcely be said to be proved by battle, is by the beneficial use of this constitution more rapidly and more conveniently demonstrated. We have here then no popular institution growing up in the customary law of our race, but a royal boon, *regale quoddam beneficium*.

(2) Then again Henry institutes those possessory assizes which we have more than once mentioned. A person who has been ejected from possession of his freehold, who has been 'disseised,' can obtain a writ directing the sheriff to summon twelve men to testify before the king's justices whether there has been a disseisin or no. Here we approach one step nearer

¹ *De Legibus Angliae*, II, 7. *Select Charters*, p. 161.

to the trial by jury of later times ;—the question submitted to these recognitors is more definitely a question of fact—has there been seisin and disseisin—not who has the greater right ; but still these recognitors are summoned in as witnesses, as neighbours who are likely to know the facts.

(3) By the establishment of the grand assize and of the possessory assizes, a great step is made in the history of trial by jury. The royal process of ascertaining facts and rights by the sworn testimony of a body of neighbours is now placed at the disposal of ordinary litigants ; partly this may be in the interests of justice, but also it is in the interest of a king consolidating his realm, struggling with feudalism, desirous of making himself the one fountain of justice. But as yet this procedure by inquisition or recognition has a very definite scope : it is appropriate to certain actions and only to certain actions, and the form of the recognition varies with the form of the action—thus in the grand assize four knights elected by the parties elect the twelve recognitors, in the possessory assizes the twelve recognitors are directly summoned by the sheriff. And the question for the recognitors is determined by the form of the action. Thus in the grand assize it is whether demandant or tenant hath the better right to hold the land ; in the novel disseisin, it is whether the defendant unjustly and without judgment disseised the plaintiff. These assizes are the outcome of definite legislation, but the procedure by recognition, once made common, spreads beyond the original bounds—gradually and without legislation. We find plaintiffs and defendants in all manner of actions purchasing from the king the right to have a recognition or inquest to determine some disputed point. By slow degrees what has been a purchasable favour becomes an ordinary right, and the sum which the party has to pay to the king becomes less and less a variable price, more and more a definite tax or court fee fixed by custom. It is a slow process by which this recognition procedure makes head and displaces the older methods of proof, the unilateral witness, procedure and compurgation. There is no one moment at which we can say that it becomes law that questions of fact must go to a jury, to a body of sworn recognitors. In certain

forms of action, the older processes maintained their footing. Thus even in the present century, there were certain actions in which a defendant might have recourse to compurgation; and for this reason those actions were never brought: means had long ago been discovered of bringing other actions in their stead. However, the new procedure slowly became the rule, and the old procedure the exception; in general disputed questions would be settled by the oath of the country, would be settled by trial by jury—by a jury (*jurata*); gradually this word came into use and was contrasted with *assisa*. The word *assisa*, as already remarked, implies a positive ordinance; it is a procedure which, as we should say, is statutory, and you should understand that the old assizes might have been used and were occasionally used even in the present century. They were not abolished until 1833, but long before that had become uncommon, their work being done for the most part by less cumbrous and antiquated machinery. But by the side of the assizes, there grew up the practice of sending to a body of recognitors questions of fact which arose out of the pleadings in an action; a body of jurors thus called in was a jury, *jurata*, as contrasted with an assize, *assisa*. In an assize, the very first step was to obtain a writ directing the sheriff to summon twelve men to answer a particular question, e.g. whether A disseised B; the question for the assize was formulated in the original writ. Take another action, e.g. an action of trespass; the original writ says nothing of any recognitors, nothing of any mode of trial; A is summoned to answer before the king's court why he assaulted and beat B; then A and B plead before the court until they come to an issue about some question of fact or question of law; if it be a question of fact, then a jury (*jurata*) is summoned to answer this question—a question which has arisen out of the pleadings—not a question formulated in the original writ.

(4) In dealing with civil, before criminal, procedure we have been following the historical order. What we are apt to think the very typical case of trial by jury, the trial of a man for crime by a petty jury after a grand jury has indicted him, is the last development of the institution which has been

under our examination. But we have first to speak of the accusing jury, of what comes to be the grand jury of modern times. Here again, it is an ordinance of Henry the Second that establishes the procedure as normal. If any trace at all of a jury, or of anything that is on its way to become a jury, is to be found in the Anglo-Saxon laws, it is the trace of an accusing jury. In one of the laws of Ethelred, we read how in a particular case the twelve eldest thanes are to go out and swear on the relic that they will accuse no innocent man and conceal no guilty man. It is conceivable that this law has a general import, and that by the end of the tenth century it was part of the procedure of the local courts that a body of neighbours should be sworn to present the crimes which had come to their knowledge. But it is difficult for want of continuous evidence to connect this law with the measures of Henry the Second, and the meaning of Ethelred's law is much disputed. On the other hand, as already said, the accusing jury was an element in the procedure of the Frankish courts under the Carolingian kings, and produced in Normandy under the Norman dukes. It may be then that Henry reformed or revived an ancient English institution, but more probably we have here another offshoot of the royal and fiscal inquisition. To ascertain and protect the rights of the crown is the main object, and it seems almost a by-end that incidentally crime may thus be discovered and suppressed. The itinerant judges are supplied with lists of inquiries which they are to lay before juries representing the various hundreds which they visit. These lists of inquiries are known as articles of the eyre, *capitula itineris*, and in the main they are fiscal inquiries; the royal revenue is the chief end in view. The jurors are to swear as to what profits have fallen to the crown, as to escheats, forfeitures, marriages, wardships, widows, Jews, treasure trove and other sources of income; also as to the misdoings of the sheriff and his bailiffs; also as to murders, robberies and so forth, for crime also brings money to the royal exchequer—for instance there are the murder fines to be collected. It is not improbable that our Norman kings occasionally directed inquisitions of this sort. In Henry the Second's reign, under the Assizes of Clarendon

and Northampton, the presentation of crimes by twelve men representing each hundred was made a regular permanent procedure. The twelve sworn hundredors are to present crimes; the persons whom they accuse are to go to the ordeal; if they fail at the ordeal they are to be punished by mutilation. What is more, the Assize of Northampton betrays some mistrust of the efficacy of the ordeal as a means of eliciting the truth, for even if a person thus accused satisfies the test, and thus has the judgment of God in his favour, he is to abjure the realm, that is, he is to leave the realm swearing never to return. You observe that these twelve sworn hundredors are sworn accusers; their testimony is not conclusive; their oath does not lead to immediate condemnation; it leads to trial; it puts the accused on his trial; he must go to the ordeal. In short they are the ancestors of our grand jurors, not of our petty jurors, and their sworn accusation is an indictment. For the rise of the petty jury we must look elsewhere. But let us pause to remark that these measures of Henry the Second institute a new mode of procedure in criminal cases, they put the indictment by the side of the appeal. Thenceforward English law has two criminal procedures; there is the appeal—a private accusation brought by the person primarily wronged by the crime, the person, e.g., whose goods have been stolen, or the nearest kinsman of the murdered man; then there is the indictment—the sworn accusation of twelve men who have sworn to present the crimes committed within their hundred. These two modes of procedure live side by side until modern times; the appeal of felony was not abolished until 1819; the indictment we still have, though in course of time its real nature has undergone a great change.

(5) And now as to the petty jury or trying jury in criminal cases. We cannot trace this back to any positive ordinance; it makes its way into our procedure almost insensibly and that too at a comparatively recent time—by which I mean that the system of assizes and juries in civil cases was in full swing before it became common that persons accused of crimes should be tried by the oath of their neighbours. From the Norman Conquest onward the regular means of bringing a criminal to justice was the appeal, or

private accusation, and this led to trial by battle. Gradually, however, in the reigns of Henry II and his sons, we find that appellees can purchase from the king the privilege of having questions tried by an inquest of neighbours. At first the questions thus tried seem merely to be incidental questions arising out of the pleadings, as for instance, whether the appellee is a maimed man who need not fight, or is above the fighting age. The questions thus tried become in course of time more substantial and touch the real issue of guilt or innocence: thus the appellee sets up an *alibi* and obtains an inquest to prove this; or again he asserts that the appellor is moved to the appeal by no honest motive, but by spite and hatred, and obtains an inquest to prove that this is no true appeal but is the outcome of *odium et atya*. Lastly, we find the appellor putting himself on an inquest for the whole question of guilt and innocence—*ponit se super patriam et de bono et de malo*—he puts himself on his country, i.e. on his neighbourhood for good and for ill. An article of the Great Charter (the meaning of which has been contested) seems to provide that thenceforward an appellee is to have a right to put himself upon an inquest without having to purchase this as a privilege from the king¹. By the time when Bracton wrote (circ. 1250) it seems to be law that an appellee has two alternatives open to him; he can defend himself by battle or he can put himself upon his country, occasionally (as e.g. if the appellor be beyond the fighting age) the appellee must be forced to put himself upon his country.

Thus much as to trial by jury in the case of an appeal; but as already said Henry II established by the Assizes of Clarendon and Northampton another criminal procedure, namely the indictment. Now under these ordinances the person indicted went to the ordeal, but as already noted some distrust of the ordeal was already shown, for even if there was supernatural testimony in favour of innocence still the accused, *si fuerit de pessimo testimonio et publice dif-famatus*, had to abjure the realm. Half a century later the ordeal went out of use. The Fourth Lateran Council, held in

¹ M. C. c. 36. McKechnie, pp. 417—27.

1215, prohibited the clergy from taking part in the ordeal, and thus in effect abolished it, for the ordeal was nothing if not a religious ceremony. We find the council of an English king (Henry the Third had just become king and was yet a boy) at once accepting the abolition as an accomplished fact and making provision for the new state of affairs. It seems to become law that a person indicted by the twelve hundredors must submit to be tried by an inquest of neighbours or else must remain in gaol. I think that during the first half of the thirteenth century some at least of the king's judges held that, even if the accused would not voluntarily put himself upon the oath of his neighbours, nevertheless he could be tried, an inquest could be sworn, and, if it made against him, he could be sentenced and punished. It seems to me that this was Bracton's opinion, but that he did not care to express himself very plainly. Doubtless there was a very strong feeling that to try a man by a jury, when he had not submitted to be so tried, was thoroughly unjust. We moderns, especially if we come to the subject with the too common belief that trial by jury is a process of popular customary origin of immemorial antiquity, the birthright of Englishmen and so forth, must find it hard to realize this sentiment, but, if we fail to do this, an important tract of legal history will be for us a stupid blank. The mere oaths of twelve sworn witnesses (remember that the jurors of the thirteenth century are witnesses) are not enough to fix a man with guilt, unless indeed he has voluntarily submitted his fate to this test; he ought to be allowed to demonstrate his innocence by supernatural means, by some such process as the ordeal or the judicial combat; God may be for him, though his neighbours be against him. It is interesting to find that this notion was not confined to England; Brunner has shown that it crops up in Normandy and in other parts of France—a man is not to be condemned on the evidence of his neighbours unless he has put himself upon their oath¹. I think, as already said, that some of the judges of Henry III's reign had risen above this notion and sent to trial by jury men who distinctly and emphatically

¹ Brunner, *Schwurgerichte*, pp. 469—77.

refused trial ; but before the end of the century it had become established that the indicted person could not be sent to trial unless he put himself upon his country. He could not be tried, but he could be tortured into saying the requisite words ; superstitions look odd when they have ceased to be our own superstitions : it became law that an indicted person who, when asked how he would be tried, stood mute of malice, that is, refused to answer ‘ By God and my country,’ might be pressed and starved to death. I need not give the details of this, the *peine forte et dure*, but one should think of it whenever one hears talk of trial by jury as of an obviously just institution. Our ancestors did not think so.

At the end of Edward I’s reign, the moment at which we have placed ourselves, the situation therefore is this. In all civil actions, trial by jury—i.e. by a body of neighbour witnesses—has become the usual mode of trial, though still in certain cases, not very common, the defendant can have recourse to compurgation or to trial by battle. As to criminal cases—a person appealed may if he pleases put himself upon a jury instead of fighting ; jurors also are sworn in to indict criminals, the person thus indicted must consent to be tried by another jury ; if he will not consent, he is pressed or starved to death. All jurors, however, are as yet witnesses, or sworn accusers ; the process which turns them into judges of fact, judges of fact testified by others, by witnesses produced and examined in their presence, has hardly yet begun. The fact that jurors are regarded as witnesses is brought out by this ; in many cases, and their number is increasing, the person against whom the jurors have given a verdict may take proceedings against the jurors for perjury : these proceedings are called an attain ; the verdict of the twelve jurors is brought before a jury of twenty-four, and if these twenty-four find that the verdict was false, it is set aside and the twelve perjured jurors are heavily punished. Also we may remark that as yet it is hardly well established that the jurors must give an unanimous verdict ; in old times the verdict of a majority has been accepted.

We have now taken account of the doctrines whereby the royal jurisdiction had extended itself, and of the new institution, *regale beneficium*, which had made royal justice preferable to

all other justice. We may now look at the courts as they stand in Edward's reign.

(a) The old local courts still exist; as a political assembly the county court is still of first-rate importance, it is this that is represented in parliament by the knights of the shire; but as a court of law it has lost much of its importance. Almost all civil causes of any great importance can now be begun in the king's court, where there can be trial by jury. Nor is this all; a statute has lately been passed, the Statute of Gloucester (1278), which has been construed to mean that no action for more than 40 shillings can be brought in these local courts¹. The statute does not say this; what it says is very different, viz. that no action for less than 40 shillings is to be brought before the king's justice—apparently it was felt that the centralization of justice had already gone too far; it was a hardship for men to be brought to Westminster for less than 40 shillings. However, the king's justices seem to have at once construed this to imply that suits for *more* than 40 shillings were not to be brought in the local courts. Thus the competence of those courts was now restricted by a barrier, which grew narrower and narrower as the value of 40 shillings became less and less. As to criminal proceedings the county court had lost its jurisdiction. The first steps in appeals of felony were taken in the local courts, but those courts could *try* no cases in which there was talk of a breach of the king's peace. Presentments also and indictments were taken in the local courts; but they could not try the indicted. Quite petty offences could be punished however by pecuniary amercements in the hundred court and the courts leet, that is, hundred courts which had fallen into private hands; but even in these cases the penal jurisdiction was now deemed to emanate from the king, and was exercised by his sheriff or by some lord claiming under royal grant. The private penal jurisdictions Edward had tried to suppress by demanding that all those who claimed them should prove a title derived from the crown—they seldom extended beyond the hanging of a thief caught in the act with the stolen goods upon him.

¹ See, for a fuller account of the decline of manorial jurisdiction, Maitland, *Select Pleas of Manorial Courts* (Selden Society), Introduction.

(b) The manorial courts as regards freehold had perhaps not lost much in theory—it was still the rule that a proprietary action for land freehold of the manor should be begun in the manor court, but this rule, though sanctioned by Magna Carta, was easily and successfully evaded. My impression is that before the end of the thirteenth century it was a very rare thing for an action concerning freehold to be begun, tried, and ended in a manor court. But the king's courts had not yet undertaken to protect the tenant in villeinage against his lord or to regard him as having any right in his land. Disputes as to lands holden by villein services were still heard and determined by the customary court of the manor, and in such courts alienations were effected, the old tenant surrendering the land to the lord who admitted the new tenant.

(c) The king's court, as we have seen, has by Edward's time split itself up into three different courts of law, the King's Bench, the Court of Common Pleas and the Exchequer. The stages in this process can be dated, but we must not go into details. The last stage is reached when the office of chief justiciar was extinguished. This we may say happens at the end of Henry III's reign. In 1232 Henry dismissed Hubert de Burgh, who is the last chief justiciar in the sense of being the king's first minister and lieutenant-general. Henry was then under the influence of the foreign party, and he appointed one Stephen Segrave to the justiciarship: but two years afterwards the barons revolted against the foreigners and Segrave was dismissed. Henry then tried for many years to rule without a justiciar, without ministers. For a short time near the end of the reign there was again a justiciar, but in 1268, shortly before Henry's death, the office became empty and was never again filled up. Thenceforth each of the three courts had its chief justice—there was the chief justice of the King's Bench, the chief justice of the Common Pleas, the chief Baron of the Exchequer. The extinction of the chief justiciarship is important in many ways. It marks a stage in the separation of judicial from governmental functions: the head of the court of justice is no longer the prime minister. This leads to the rise of the chancellor; Edward's first minister, probably the chief adviser in his legislative scheme, is his chancellor,

Burnell. But from this time forward we may say there is a body of judges who are expected to be non-political, who are to hold the balance of justice evenly not merely between subject and subject, but also when the king himself is concerned. Still we must not, for a long time yet, think of the judges as enjoying any great degree of independence; they are still the king's servants; they hold their offices for centuries to come during the king's good pleasure, and occasions on which the royal will is allowed to interfere with the course of royal justice are but too frequent. Of each of these courts a word:—

(i) The King's Bench is theoretically a court held before the king himself, and for a long time yet, its justices journey about with the king. It is very clear that both John and Henry III did justice in person. The theory of the time saw no harm in this. Bracton explains that all justice flows from the king; it is merely because he has not strength enough and time enough that he delegates some of his powers to justices. It was but gradually that the king abandoned the practice of sitting in court; but in the fourteenth century it had, I think, become uncommon for him to do so. Still to the very end of its career in 1875 the King's Bench was theoretically a court held *coram ipso domino Rege*; any suitor ordered to come before it, was bidden to appear *coram nobis ubicunque fuerimus in Anglia*. As to its functions:—it was in the first place the central court for pleas of the crown. Criminal cases had to be begun in the counties in which the crime was committed, before those itinerant justices of whom hereafter; but the King's Bench had criminal jurisdiction as a court of first instance over the county in which it sat. But further it had a general superintendence over criminal justice; it could order that any criminal case should be removed from the courts of the itinerant judges and brought before it. Secondly, it had a large power of superintendence over all royal officers, sheriffs, and the like—would entertain complaints against them and bid them do their duties. Thirdly, it had a large civil jurisdiction; it could entertain any civil action in which the defendant was charged with a breach of the king's peace—and as I have already said, this idea of the king's peace

had been so enormously extended that any unlawful use of force, however small, could be regarded as a breach of the king's peace and could be brought before the King's Bench. Not content with this it proceeded by means of fictions to steal business from the Common Pleas. A great deal of our legal history is to be explained by the fact that for centuries the judges were paid by fees; more business therefore meant more money, and they had a keen interest in attracting cases to their courts.

(ii) The Court of Common Pleas was the central court for all cases between subject and subject. The charter provided that such cases should not follow the king, but should be heard in some certain place; as a matter of fact, this court was seldom removed from Westminster. It had a concurrent jurisdiction with the King's Bench in actions of trespass in which mention was made of the king's peace, while all other civil cases belonged of right to it. In course of time, however, both the King's Bench and the Exchequer contrived to rob it of a great deal of work.

(iii) The Exchequer of Edward's reign was as yet a somewhat ambiguous institution—both a court of law and an administrative bureau. In its former capacity it heard suits relating to the royal revenue. In its latter it collected the revenue and paid it out. Gradually these functions were separated. The fiscal work, the receipt and collection of revenue, was under the control of the lord treasurer, assisted by the chancellor of the exchequer, while a chief baron and three or four other barons heard and determined the litigious proceedings, and in course of time stole a great deal of work from the court of common pleas. The separation in this financial department of the administrative from the judicial work took, however, a long time:—the modern treasury is an offshoot of the ancient exchequer, and down to 1875 the chancellor of the exchequer was entitled to sit as a judge along with the barons, and just for form's sake a newly appointed chancellor of the exchequer used to sit there and hear a case or two. The barons of the exchequer of Edward's day, and even of a much later time, were not as a rule professional lawyers.

Such were what came to be known as the three superior courts of common law:—this phrase ‘of common law’ has not as yet acquired one part of the meaning which it had in later times: for the present we hear nothing of any court of ‘equity.’

The evolution of these definitely judicial bodies did not, however, exhaust the fount of royal justice. If all other courts failed the king might still do justice in his council or in his parliament. The king’s court of the Norman reigns had been, we have seen, in theory a court of prelates and barons; it is not until we have come to the days of Henry II that we find a smaller group of professional judges doing the ordinary and rapidly increasing work of the *curia Regis*. We have seen also that during the thirteenth century there grows up a contrast between the king’s permanent council (*concilium Regis*) and the great council of the nation (*commune concilium regni*). In either of these assemblies the king can do justice, and during the reign of Edward I the machinery of government works so easily, and there is (except at the one great crisis of 1297) so little opposition to the king, that men are not very careful to distinguish between these two bodies. We have noticed this as regards legislation; the contrast between statute and ordinance is not emphasized; of some of Edward’s laws it is hard to say whether they proceed from the king in parliament or from the king in council. So with judicature; the errors of all inferior courts may be brought in the last resort for correction before the king in parliament or before the king in council. Looking a little forward we see that this work, the work of an ultimate court of error, becomes definitely the work of parliament, but is transacted only by that part of the parliament which is of ancient date. The representatives of the commons, though they make good their claim to share in all legislation, never take part in this judicial work. Thus the House of Lords, the assembly of prelates and barons, becomes the ultimate court of error—still in name and theory the jurisdiction is that of the king in parliament. On the other hand jurisdiction is also claimed for the king in council—a long and stormy history lies before this claim, the history of the Star Chamber, the history of the Court of Chancery; but for the present under Edward’s just and steady rule all

works well—there is no great need to distinguish between the permanent group of advisers and the occasional assembly of prelates and magnates—the one may be treated as a standing committee of the other.

(*d*) It remains to speak of the visitatorial courts:—

From an early time a great deal of the work of royal justice is done not by the central tribunal but by itinerant justices, sent out by royal commission to hear cases in the various counties. We hear of such judges in the reign of Henry I; their visitations become normal and systematic under the rule of Henry II. The king commissions justices to transact this and that judicial business in the various counties of England. These commissions take various forms more or less comprehensive. First, justices may be sent out *ad omnia placita*, that is, to entertain all manner of pleas belonging to the county in question. Justices acting under this comprehensive commission are known pre-eminently as justices in eyre—their journey is an *iter* or eyre. When such a commission is issued, then all the business belonging to the county in question which is pending in the king's court is adjourned out of that court into the eyre—so that if the parties to a suit would otherwise have been bound to appear before the Bench at Westminster and take some step in the action, they will now be bound to appear before the justices in eyre. Further, these justices are armed with lists of inquiries which they are to lay before jurors representing the various hundreds of the county and to which such jurors must return answer on oath. Such *capitula itineris*, articles of the eyre, relate chiefly to crimes and to royal rights—the criminal and financial inquiries seem curiously mixed up together—for in truth crimes are pleas of the crown, and a source of royal revenue. So the justices in eyre inquire of murders, robberies and other felonies, also of escheats, wardships, marriages and the like, also (and this must have been important business) of the illegal profits of sheriffs and other royal officers. The whole of the county is summoned to meet the justices. In fact the justices hold a very solemn meeting of the county court and do royal justice therein. Now eyres of this kind were made throughout the thirteenth century. It is said that they

were usually made once in every seven years; but certainly this period was not strictly observed; the king could order an eyre when and where he pleased. An eyre seems to have been regarded as a sore burden on the county, the attendance of all freeholders was required, and the justices exercised large powers of fining and amercing the county, hundreds, townships and individuals for neglect of police duties, small infringements of royal rights and other minor misdoings. Complaints of the frequency of these eyres were often made. They seem to have gone out of use in the time of Edward III. As machinery for collecting revenue they were becoming unnecessary: the king was beginning to depend more and more on taxes granted by parliament, less and less on the profits of jurisdiction and the income derived from his feudal rights, escheats, wardships and so forth. Justice could be done in the counties under less comprehensive commissions, commissions of a purely judicial kind.

By this time, besides the commission for a general eyre there were three other commissions in use—commissions which are still in use at the present day. Of these a few words must be said.

(1) The Commission of Assize. We have seen that Henry II instituted certain actions for the protection of possession, the three possessory assizes of Novel Disseisin, Mort D'ancestor and Darrein Presentment. Justices were sent out to take these assizes, that is, to hear and determine these possessory actions. Evidently circuits under such a commission, unlike the general eyres, were popular. John was obliged to promise in the charter of 1215 that justices for this purpose should be sent four times a year—in the charter of 1217 this was changed to once a year. This promise seems to have been fairly well kept. At first it was the practice to commission as justices some four knights of the shire; but gradually during Henry III's reign this work falls more and more into the hands of the professional judges of the royal court. It becomes the practice to commission one of them and such knights of the county as he shall associate with himself. The opinion gains ground that such work cannot properly be left to amateurs, and divers statutes from the

end of the thirteenth and from the fourteenth century provide that one of the justices hearing the assize must be a judge of the King's Bench or Common Pleas or a serjeant at law.

Then in 1285 the Statute of Westminster II threw a great deal of new work upon these justices of assize. By this time trial by jury had become the common mode of trying actions other than the assizes. When an action in one of the courts at Westminster was ready for trial, when, that is, the parties by their pleadings had raised some issue of fact, it had been the practice to summon to Westminster a jury from the county to which the case belonged—thus if it was a Cornish case the sheriff of Cornwall would be directed to send jurors from Cornwall. It is to me very surprising that Englishmen should so long have borne this heavy burden. But so it was; we still may read on the contemporary rolls how jurors from the remotest corners of England journeyed up to Westminster to give their verdicts. But in 1285 it was ordained that the trial of such actions should, at least as a general rule, take place before the justices of assize. The court then in which the action was depending, instead of bidding the sheriff send Cornishmen to Westminster, would tell him to have the jurors at Westminster on a certain day, unless before that day (*nisi prius*) justices of assize should come into Cornwall. The same statute (West. II, 13 Edw. I, c. 30) directed that assizes should be taken thrice a year, but at some time or another it became the practice to send them only twice a year—only once a year into the four northern counties. As a matter of course, then, the justices of assize would come round before the day named in the writ, and then the case would be tried at *nisi prius*. Now it is well to understand that though as a matter of fact the justice of assize sitting to try a case at *nisi prius* was usually one of the judges of one of the three courts of common law, he sat there not as such a judge but merely as a royal commissioner sent out for this one occasion to take the assizes of a particular county. For instance the queen (I am speaking of what happened twelve years ago) might commission a judge of the Common Pleas to take the Cambridgeshire assizes¹. He would come

¹ i.e. before the Judicature Act of 1875 which amalgamated the three courts.

to Cambridge, and under the Statute of Westminster he would try with a jury all the Cambridgeshire actions which were ready for trial, no matter in which of the three courts they were depending. The court he held would not be the court of Common Pleas nor the King's Bench nor the Exchequer. He would be sitting as a royal commissioner, empowered to try these cases. His one business would be to preside at the trial. In general, though to this there were some statutory exceptions, he could not give judgment. The action was an action pending in one of the central courts, the Westminster courts, and it was for that court to give judgment.

(2) The Commission of Gaol Delivery. Even while eyres *ad omnia placita* were still in use we find commissions of gaol delivery. These can be traced to the very beginning of the thirteenth century. The king by such a commission directed certain justices to deliver a certain gaol; that is to say, to try all the prisoners who were in that gaol. This must in times past have been comparatively light work, for accused persons were seldom imprisoned unless they were charged with homicide, and this commission did not, I think, authorize the taking of indictments against those who were not in gaol. Such commissions are still issued in very much their old form—they are directed to the judges of the Westminster courts, the serjeants, queen's counsel and circuit officers, and empower them or any two of them (of whom one must be a judge, serjeant or queen's counsel) to deliver the gaol.

(3) General Commissions of Oyer and Terminer are not, I think, so ancient; they come into use as the eyres are dropped. They are directed to the same persons as the commissions of gaol delivery, and usually, I believe, to some great noblemen, landowners of the district. They authorize these commissioners to hear and determine all felonies and other crimes in the county. According to the interpretation put upon these two commissions in modern times there is but little difference between them; they authorize almost exactly the same things; but it seems to me clear that in old times the Oyer and Terminer was a far more comprehensive authority than the Gaol Delivery, since the latter did not empower the

commissioners to receive indictments against those who were not in gaol.

Now the cases which came before justices sitting under these two last-mentioned commissions were criminal cases, pleas of the crown, and they were not, you should understand, cases depending in courts at Westminster like the civil cases heard at *nisi prius*. The whole procedure—indictment, pleading, trial—took place before the commissioners, and they could pass judgment and sentence—and thus completely dispose of the whole case.

The general result of this system of commissions was that a great deal of royal justice was done not by the permanent central courts, but in the counties, by commissioners sent out just for that occasion. They could completely dispose of the criminal business of the county, and could preside over the trial by jury of civil actions depending in the central courts. In course of time more and more of this circuit work was done by the judges of the king's permanent courts. The details of the system, which was still in working order but a few years ago, you will have to learn at some future time: the importance of it in the history of our law has been immense; owing to this system is it that we have never had powerful local tribunals and what follows from such tribunals, a variety of provincial laws; and again it was under the discipline of the eyres that the counties and boroughs learnt the first rudiments of representative government.

F. *Retrospect of Feudalism.*

Before quitting the first of our historic periods it will be well for us to take a brief review of what we call feudalism—in the first place to come to some understanding about the meaning of the word, and then to see how far England was ever subject to what can properly be called a feudal system. We shall thus have occasion to speak of the growth of that system of land law which hitherto we have considered merely as an existing fact.

And first we will observe that in this country any talk of a feudal system is a comparatively new thing: I should say that

we do not hear of a feudal system until long after feudalism has ceased to exist. From the end of the seventeenth century onwards our English law grew up in wonderful isolation; it became very purely English and insular. Our lawyers seem to have known little and cared nothing about the law of foreign countries, nothing about Roman jurisprudence. Their English authorities were all sufficient for them, and neither our parliaments nor our courts were subjected to any foreign influence. Coke in his voluminous works has summed up for us the law of the later Middle Ages, but in all his books, unless I am mistaken, there is no word about the feudal system. If, we may say, he expounds that system in full detail so far as that system was English, he is quite unconscious that he is doing anything of the kind; he has no thought of a system common to the nations of Europe, he is speaking of our insular law. No, for 'a feudal system' we must turn from Coke to a contemporary of his, that learned and laborious antiquary, Sir Henry Spelman. Coke was born in 1552 and died in 1633; Spelman was born in 1562 and died in 1641: so they were just contemporaries. Now were an examiner to ask who introduced the feudal system into England? one very good answer, if properly explained, would be Henry Spelman, and if there followed the question, what was the feudal system? a good answer to that would be, an early essay in comparative jurisprudence. Spelman reading continental books saw that English law, for all its insularity, was a member of a great European family, a family between all the members of which there are strong family likenesses. This was for Englishmen a grand and a striking discovery; much that had seemed quite arbitrary in their old laws, now seemed explicable. They learned of feudal law as of a medieval *jus gentium*, a system common to all the nations of the West. The new learning was propagated among English lawyers by Sir Martin Wright; it was popularized and made orthodox by Blackstone in his easy attractive manner. If my examiner went on with his questions and asked me, when did the feudal system attain its most perfect development? I should answer, about the middle of the last century. It was then, I should add, that the notion of one grand idea and a few simple

principles underlying the mass of medieval law, English and continental, was firmly grasped and used as a means of explaining all that seemed to need explanation in the old English law. Now this was an important step—this connecting of English with foreign law, this endeavour to find some general intelligible principles running through the terrible tangle of our old books. Most undoubtedly there was much in our old law which could be explained only by reference to ideas which had found a completer development beyond seas, and to Blackstone and to Wright, and above all to Spelman, we owe a heavy debt. But since Blackstone's day we have learned and unlearned many things about the Middle Ages. In particular we have learnt to see vast differences as well as striking resemblances, to distinguish countries and to distinguish times. If now we speak of the feudal system, it should be with a full understanding that the feudalism of France differs radically from the feudalism of England, that the feudalism of the thirteenth is very different from that of the eleventh century. The phrase has thus become for us so large and vague that it is quite possible to maintain that of all countries England was the most, or for the matter of that the least, feudalized; that William the Conqueror introduced, or for the matter of that suppressed, the feudal system.

What do we mean by feudalism? Some such answer as the following is the best that I can give—A state of society in which the main social bond is the relation between lord and man, a relation implying on the lord's part protection and defence; on the man's part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land—the man holds land of the lord, the man's service is a burden on the land, the lord has important rights in the land, and (we may say) the full ownership of the land is split up between man and lord. The lord has jurisdiction over his men, holds courts for them, to which they owe suit. Jurisdiction is regarded as property, as a private right which the lord has over his land. The national organization is a system of these relationships: at the head

there stands the king as lord of all, below him are his immediate vassals, or tenants in chief, who again are lords of tenants, who again may be lords of tenants, and so on, down to the lowest possessor of land. Lastly, as every other court consists of the lord's tenants, so the king's court consists of his tenants in chief, and so far as there is any constitutional control over the king it is exercised by the body of these tenants.

That seems our idea of a feudal state. It is vague, it can only be described in very abstract terms; the concrete actual realities to which it answers, the Germany, France, England of different centuries may differ from each other very widely. A state which has these characteristics may be a powerful compact centralized kingdom; it may be hardly more than a loose confederation of principalities, a practical denial of national unity.

Now towards such an organization English society had been making progress for centuries before the Norman Conquest—and, as it seems, with an ever increasing velocity. The general nature of the process I shall describe in the words of Stubbs.

‘The general tendency of the movement may be described as a movement from the personal to the territorial organization, from a state of things in which personal freedom and political right were the leading ideas, to one in which personal freedom and political right had become so much bound up with the relations created by the possession of land, as to be actually subservient to it....The main steps are apparent. In the primitive German constitution the free man of pure blood is the fully qualified political unit; the king is the king of the race; the host is the people in arms; the peace is the national peace; the courts are the people in council; the land is the property of the race, and the free man has a right to his share. In the next stage the possession of land has become the badge of freedom; the free man is fully free because he possesses land, he does not possess the land because he is free; the host is the body of landowners in arms, the courts are the courts of the landowners. But the personal basis is not lost sight of: the landless man may still select his lord;

the hide is the provision of the family ; the peace implies the maintenance of rights and duties between man and man ; the full-free is the equal of the noble in all political respects. In a further stage the land becomes the sacramental tie of all public relations, the poor man depends on the rich, not as his chosen lord, but as the owner of the land that he cultivates, the lord of the court to which he does suit and service, the leader whom he is bound to follow to the host ; the great landowner has his own peace, and administers his own justice¹.

If for one moment we trespass outside the bounds of legal history, we may, I think, observe that one main cause of this movement is economic. The distribution of wealth becomes more and more unequal. Conquest and feuds may have something to do with this, but we need not, indeed cannot, ascribe it chiefly to violence. The better the peace is kept, the better the law is administered, the more progress is made towards free contract and free alienation, the more rapidly will great inequalities become common. In a time when there is little manufacture this will mean that land will be unequally distributed ; land becomes amassed in the hands of the rich, and wealth breeds wealth. But the rich do not really want the land, they want the produce of land. They want their lands cultivated. What is more, they are willing to let out their lands on very permanent terms. There is no speculation, no buying to sell or selling to buy ; to grant out land for ever at a perpetual rent—to receive it on those terms is no imprudent bargain—no rise or fall in prices is anticipated. I think it is well to bear this in mind ; for there seems to me a tendency to lay too much stress on the military and political, too little on the economic side of feudalism. When considered it seems not unnatural that a society consisting of *landowners*, free and barbarous, should by quite peaceful causes become transmuted into a society of landlords and tenants. But if we may look to such abstract considerations for the cause, we must look elsewhere for the facts of feudalism.

Now that personal relation between lord and man which is one ingredient of feudalism, is indeed old ; we may see it

¹ *Constitutional History*, vol. I, § 69.

in the first page of the history of our race. It can be traced to the relation between the German *princeps* and his *comites* described by Tacitus. Attached to the chieftain by the closest ties is a body of warlike companions—in many cases the sons of nobles, ambitious of renown: he provides their equipment, entertains them at his board. In war they fight for him, at once his defenders and the rivals of his prowess. They are bound to protect him, perhaps they even swear to do so. The *comes* is a dependent, but such dependence is glorious; such service is preferable to the most perfect freedom. It was under leaders surrounded by such bands of *comites* that England was conquered by the German tribes. The *comes* of Tacitus may be recognized in the *gesith* of the Anglo-Saxon laws, a name which gradually gives way to that of thegn, a word which to start with means simply servant. But at first we cannot call this a feudal institution; it seems utterly unconnected with any tenure of land. The *comes* is not a landowner or land-holder, he is an inmate of his leader's household. But in England the thegn does come to be a landowner. The folk-land, the national land not yet appropriated, seems regarded as the natural fund out of which rewards may be provided for those who in war or otherwise have deserved well of the state¹. The king with the counsel and consent of his wise men confers land on his distinguished followers. In England thegnage tends to become territorial. It seems expected that a thegn will naturally be a large landowner. The process goes further—the large landowner is worthy of thegn right; he who has five hides of land and certain other rights which seem to be rights of jurisdiction over his dependents is entitled to be deemed a thegn, and so receives certain privileges such as an increased wergild, or an increased value for his oath. Then again from the beginning, the thegn is the warrior; all free men are bound to fight; the army is the nation in arms; but the thegn is specially bound to fight—bound to fight for his leader. As then the thegn becomes a large landowner, and as the large landowner as such comes to be regarded as worthy

¹ See p. 57.

of the privileges of the thegnage, so the special duty of fighting, and fighting for the king, comes to be a duty incumbent on the large landowners. We know too that the folk-land, the unappropriated land which according to the older idea had belonged to the nation, had been becoming more and more the king's demesne land in fact, if not in theory. Stubbs notices that from Alfred's time onwards the clause in the deeds granting this folk-land, which expresses the counsel and consent of the witan, becomes rarer though it never disappears altogether. The wise men rather witness the grant than authorize it. After the Conquest, all this folk-land became simply *terra Regis*, the king's demesne; but large as the change may seem to us, very possibly it was a change rather in terminology than in anything else; it was a recognition of what had well-nigh become an accomplished fact. The thegn then who has received a grant of such land and who is bound to military service—it takes but a small change of ideas, a change in the point of view from which the facts are seen, to regard him as holding land of the king by military service. Exactly wherein consisted the special military obligation of the thegn, we do not well know. According to the old order of ideas, every man was bound to serve in the national army, the king's thegns were bound to fight round him and for him. As the thegnage became connected with the possession of land—so that the owner of five hides was worthy of thegn-right—so, it would seem, a special obligation to serve and find soldiers was laid on the great landowners and in some way, which we cannot now precisely determine, was proportioned to their holdings. But to the last, to the day of the Conquest, the old national army could be called out, and it is very necessary to remember that the Conquest did not put an end to this; the old national army exists alongside of the feudal army.

But it is not only the king who has thegns—great men may have them: indeed it seems that a thegn may have lesser thegns dependent on him—just as in after-days the king's tenant *in capite* might have tenants holding of him by knight's service; still the idea of tenure is not the essence of thegnship. The history of the thegnship is brought out

by laws concerning heriots. Now in its origin the heriot is the equipment of arms which the *princeps* has provided for the *comes*; on the death of the latter, it must be given back—the word just means equipment for the army. The thegn ceases to be a member of the household, becomes a land-owner and provides his own arms; but still on his death the heriot is rendered. It now takes the form of arms and money, due to the king on the thegn's death. Thus in the laws of Canute, on the death of a king's thegn four horses—two saddled, two unsaddled—two swords, four spears, as many shields, a helm, breastplate and 50 mancuses of gold are due¹. This is important under the Norman kings: these heriots come to be regarded as reliefs, sums paid by the heir on his taking up the land which had been his ancestor's, a burden of tenure. The payment may remain the same, the mode of regarding it is different. Thus the way of feudalism is prepared.

This tie of man to lord was regarded as a tie of the most sacred kind. While many offences which we should think very grave can still be compounded with money, treason against the lord, be he the king or another lord, is a capital crime. This is laid down in the laws of Alfred, and to these laws there is a curious preface which shows the strength of the feeling. The king explains that after the nations had accepted the Christian faith, it was ordained by the wise men (spiritual and lay) that for almost every first offence a money payment might be accepted, save for treason to the lord for which no mercy should be shown, since God Almighty showed none to those who despised him, and Christ, God's son, adjudged none to those who sold him, and commanded that a lord should be loved as one's self. The crime of Judas is the crime of one who betrayed his lord².

This relation of man and lord we find in all parts of the social structure. To start with it is a relation into which men enter voluntarily. Then, however, we find the legislators requiring that men shall have lords. This rule is laid down in the laws of Athelstan (925–940)—every landless

¹ *Select Charters*, p. 74, Liebermann I, pp. 357–9.

² *Select Charters*, p. 62, Liebermann I, pp. 45–6.

man must have a lord: if he has not got one, one must be found for him by his kindred¹. This we may regard as a police measure. The law has no hold on the landless man; too often he can break the law and laugh at it; there is nothing of his that you can take from him; escape from justice is easy; he must have a lord who will be bound to produce him in court should he be wanted. Thus positive legislation extends the relation of dependence; it is required that men must either have land or have lords. The landless man may still be fully free, may have political rights, but he is dependent. The change has begun which makes freeholding, and not personal freedom, the qualification for political rights. The landless man is represented in the courts by his lord; his lord begins to answer for him, he is losing his right to attend on his own behalf, to sit there as judge and declare the law.

Probably he finds this very convenient. Attendance at the courts is a sore burden for the poorer men; they would go there to little purpose, merely to see things settled for them by the richer folk; while as to their private rights the lord will look after these, for they are much implicated with his own rights. We can see that it must have been convenient to have a lord; for what the landless are bound to do by law, the smaller landowners do of their own free will; they commend themselves to lords. We learn from Domesday that in some parts of England this practice of commending oneself had become common, especially in the eastern counties. The smaller landowners had placed themselves in a relation of dependence on superior lords. What exactly was implied by this we do not know—and very possibly commendation meant different things in different cases—sometimes, it would seem, the dependent was still able to transfer himself and his land from one lord to another; sometimes being personally quite free, he could leave his lord but then must leave his land, and in such cases it is a delicate and a verbal question whether the land is his land or has become his lord's. No legislation had turned the smaller owners into tenants of other men's lands or even compelled them to have lords—

¹ *Select Charters*, p. 66, Liebermann I, p. 170.

the change had been brought about by the private acts of individuals and the result, as sketched for us by modern writers, is intricate and confused.

But very often indeed, something which we cannot but call a tenure of land, a holding by one man of another, must have been created in a simpler fashion. By means of grants of folk-land territories were being amassed in the hands of great men and religious houses¹. These again granted out their land to cultivators. Generally such grants were of a permanent kind: grants to a man and his heirs, or grants to a man and a certain specified number of successive heirs in return for labour services, ploughings and reapings of the lord's own demesne lands, or rents payable in money or in kind. We do not find grants or leases for years—I believe that among all the Anglo-Saxon charters, there is but one specimen of such a bargain. Permanence is desired on both sides—there is no speculating for a rise or fall of prices or of rents. And here we have something very like the estate in fee simple of later law—the feudal division of complete ownership between lord and tenant. The cultivator has perhaps under the terms of the grant an estate that is to endure for ever, or at least so long as he has heirs; but the services are burdens on the land—very possibly if his heirs fail the land will again become the land of the giver, very possibly if the services fall into arrear, the giver may resume the land. We know very little about all this—for the titles of the smaller people, the cultivators of the land, were seldom evidenced by written instruments. But it is very probable that before the Norman Conquest, a large part of England was holden practically on the terms of that socage tenure that we find existing at a later day—the possessor of the land being bound to perform services more or less onerous in return for the land, to plough the lord's own land, to pay rent in money or in kind. All that seems wanting to turn such a possession into a tenure by one man of another is just the technical termi-

¹ Maitland would possibly have rewritten this sentence somewhat as follows: 'By means of royal and other books (or charters) superiorities over land were being conferred upon religious houses and great men.' *Domesday Book and Beyond*, pp. 226—58, 293—318.

nology—and to a uniform technical terminology Anglo-Saxon land law had not yet arrived. So far as we can now see, it had no theory of tenure.

We approach here a difficult subject—perhaps the most difficult in the history of English law—namely, the history of villeinage, the history of that servile land-holding which is brought to our notice in the books of the twelfth and thirteenth centuries. It seems highly probable that at the date of the Norman Conquest there was a large mass of unfree tenants cultivating lands on much the same terms as those which constitute the villeinage of later days. Slaves there most certainly were throughout the Anglo-Saxon period—the existence of a class of persons half-servile, half-free, is a more disputable point.

Another element of feudalism is plainly visible. For some time before the Norman Conquest—how long is a debated question—jurisdiction, the right to hold courts, had been passing into private hands. The doctrine had long been gaining ground that justice was the king's, that he could grant it to others, could grant to them the right of holding courts. Certain it is that Edward the Confessor had made such grants on a lavish scale. Our evidence chiefly consists of grants made to churches and religious houses—ecclesiastical bodies were careful to preserve their title deeds, and so they have come down to us—but there can be little doubt that similar grants were made to great lay landowners. England was fast becoming a land of private courts—courts in which the lord did justice among his dependents, those dependents being bound to come and sit there, and help in making of judgments. Nothing, I believe, is more the essence of all that we mean when we talk of feudalism than the private court—a court which can be inherited and sold along with land. Looking at this we may say that England was plunging into feudalism, and feudalism of a dangerous kind—for during the Confessor's reign the central power was growing weak, the great lords were growing strong. The facts of feudalism seem to be there—what is wanting is a theory which shall express those facts. That came to us from Normandy.

The Conqueror came from a land which had formed part of the territory of the Frankish Empire, and within that Empire the process which we have seen at work in England had gone on faster and further. The soil had long been Roman. The Frankish conquest of Gaul had differed essentially from the English conquest of Britain. It had been effected slowly by a German nation which had become Christian during the conquest. A large population of the old inhabitants—Celtic by blood, Roman in language and in law—became subject to Teutonic rulers. In England the small landowner was, at least generally, a free Englishman; in Gaul he was a conquered provincial. What is more, in course of time the Romance tongue prevailed in France over the German speech of the conquerors, and the customs of the Franks were impregnated by Roman law. This Roman influence is apparent at once when we compare our old dooms with the still older *Lex Salica*, the code of the Salian Franks; the former are written in Anglo-Saxon, the latter is written in Latin.

Now on the continent the history of feudalism centres round the *beneficium*, or, as it came to be called, the *feodum*. It is this, of course, which has given us the word *feudal*. The word *feodum* does not, I believe, occur before the end of the ninth century. It is derived from the German word for cattle, which, like the Roman *pecunia* derived from *pecus*, comes to mean money or property in general. It is somewhat curious that the two words which English lawyers very frequently contrast as quite opposed to each other, the *fee* and the *chattel*, should both refer us back to what is perhaps the oldest form of property, namely cattle, for *chattel* is from the low Latin *catallum*, *cattle*. But the *beneficium* was an old institution; it appears very soon after the German tribes overrun the Roman Empire. It is a gift of land made by the king out of his own estate, the grantee coming under a special obligation to be faithful—not, it seems, a promise of definite service, but a general promise to be faithful in consideration of the gift. Such grants were freely made by the Frankish kings to their great men. At first, it seems the grant was made merely for the life of the grantee. Gradually,

however, the benefice assumed a hereditary character: it was considered that the heir of the dead beneficiary had a claim to a renewal of the benefice. The hereditary character of the benefice is already recognized in a capitulary (an ordinance) of 877—two hundred years before the Norman Conquest. All offices in the Middle Ages tend to become hereditary—the kingship tends to become, actually becomes, hereditary; our sheriffdoms tend to become hereditary, in a few cases actually become hereditary; the English peers gradually acquire a hereditary right to be called to meet the king in parliament. So also the *beneficium* or *feodum* became hereditary—and yet the heir did not at once step into his ancestor's shoes: he did not hold the fief until he had been invested, put in seisin by the king, and a payment fixed more or less by varying custom might be required of him on thus relieving or taking up the fallen inheritance. This was the relief.

To express the rights thus created, a set of technical terms was developed:—the beneficiary or feudatory holds the land of his lord, the grantor—*A tenet terram de B*. The full ownership (*dominium*) of the land is as it were broken up between A and B; or again, for the feudatory may grant out part of the land to be held of him, it may be broken up between A, B, and C, C holding of B and B of A, and so on, *ad infinitum*.

The genesis of this idea of tenure, of divided ownership, has been and still is very warmly disputed among continental writers. I may refer you to the writings of Maine—*Ancient Law*, chap. viii (last part), and *Early Law and Custom*, chap. x. Very possibly some ideas of Roman law helped towards the result, but the result is a notion which is not Roman—that of a *dominium* split up between lord and tenant.

Then also jurisdiction passed into private hands—the king granted it out along with the land to be held of him. The idea that jurisdiction is the king's property and may be alienated by him had become current in France earlier than in England, the kingship had been stronger, and from the middle of the ninth century onwards such grants became common. This, it is to be remembered, is the time when the great Frank Empire went to pieces—the central authority became

little more than a name—the effective courts were the courts of the great proprietors. Also, it is to be remembered that this is the time when the Northmen subdued Normandy—the Norman duke became the vassal of the king of the French, became so by commendation—Duke Richard of Normandy commended himself to Hugh duke of the French, whose descendants became kings. But the king's power in Normandy was hardly more than nominal. A disciple of Austin would probably say that Normandy was an independent political community, though this was not quite the theory of the time. The process of feudalization had gone on within the duchy; the lords of Norman extraction dominated over a people of another blood and formed a powerful aristocracy—only the personal character, the heavy hand of the dukes, kept together the duchy as a whole.

William came from Normandy to claim the English crown which, as he alleged, was his by right as the heir whom the Confessor had chosen. It was his own personal right that he came to seek—no right that Normans had to England, but a right that he, William, had to be king of the English. The claim may have been, seemingly was, indefensible, but its nature should be remembered. To have asserted a title by victory would have encouraged very dangerous ideas: if the duke had fought and won, had not his earls and barons fought and won also? No, an air of legality was given to the whole affair—William succeeded to Edward's position. The Conquest threw into his hands a vast quantity of land. Those who fought against him were rebels, and their land was forfeited by their rebellion; each new outbreak led to fresh confiscations. His followers had to be rewarded, and they were rewarded liberally. But there was no general scramble: the new owners step into the places of old owners; a forfeiture and then a grant by the king is the link in the title. Still by means of a quiet assumption feudal tenure becomes universal. All land is held of the king.

It is, I suppose, of this that an English lawyer first thinks when he hears any talk of feudalism. For some centuries past all the feudalism that has been of importance in England has been merely land law, real property law, a part of private

law. Our land law we still say is feudal ; all land is still held of the king mediately or immediately ; this is as true to-day as it ever was. But the mere fact that it is true to-day shows that a legal theory of this sort is not the essence of feudalism, for no one would think of calling the England of our day a feudal state. If we examine our notion of feudalism, does it not seem this, that land law is not private law, that public law is land law, that public and political rights and duties of all sorts and kinds are intimately and quite inextricably blended with rights in land ? Such rights carry with them the right to attend the common council or court of the realm, the common council or court of the county ; jurisdictions, military duties, fiscal burdens are consequences of tenure ; the constitution of parliament, of the law courts, of the army, all seems as it were a sort of appendix to the law of real property.

Now this theory that land in the last resort is held of the king, becomes the theory of our law at the Norman Conquest. It is assumed in Domesday Book, the outcome of that great survey of which we are now keeping the 800th anniversary : quietly assumed as the basis of the survey. On the other hand we can say with certainty that before the Conquest this was not the theory of English law. Towards such a theory English law had been tending for a long while past, very possibly the time was fast approaching when the logic of facts would have generated this idea ; the facts, the actual legal relationships, were such that the wide principle 'all land held in the last resort of the king' would not greatly disturb them. Still this principle had not been evolved. It came to us from abroad ; but it came in the guise of a quiet assumption ; no law forced it upon the conquered country ; no law was necessary ; in Normandy lands were held of the Duke, the Duke again held of the king ; of course it was the same in England ; no other system was conceivable. The process of confiscation gave the Conqueror abundant opportunity for making the theory true in fact ; the followers whom he rewarded with forfeited lands would of course hold of him ; the great English landowners, whose lands were restored to them, would of course hold of him. As to the smaller people, when looked at

from the point of view natural to a Norman, they were already tenants of the greater people, and when the greater people forfeited their rights, there was but a change of lords. This assumption was sometimes true enough, perhaps in other cases quite false; in many cases it would seem but the introduction of a new and simpler terminology; he who formerly was a *landowner* personally bound to a lord, became a land-tenant holding land of a lord. There was no legislation, and I believe that no chronicler refers to the introduction of this new theory. As to the later lawyers, Glanvill and Bracton, they never put it into words. They never state as a noteworthy fact that all land is held of the king; *of course* it is. This is very remarkable in Bracton's great treatise. His general learning about property he draws from the Roman books, and propounds in the language of Roman law. The ultimate tenant of land, the lowest freeholder in the feudal scale, is the owner of the land, he has *dominium rei, proprietatem*, he is *proprietaryus*; but of course he holds of someone, *tenet de* some lord; if he holds of no other, then *tenet de domino rege*; there is nothing here that deserves explanation.

Now if feudalism consists only in this legal theory of tenure, then I believe we may say that of all European countries England was the most perfectly feudalized. Every inch of land was brought within it. The great shock of the Norman Conquest rendered the material very plastic; all could be brought under one idea. If for example we look at the law of medieval Germany, we find it otherwise; there is feudal land and non-feudal land, there are feudal holders and non-feudal owners side by side. There are two different bodies of law, *Landrecht* and *Lehnrecht*, Common Land Law and Feudal Law. We Englishmen can hardly translate these terms; our *Landrecht* is all *Lehnrecht*, all our land law is law about land holden by feudal tenure. But we must not forget to look at both sides of this truth; our *Lehnrecht* is *Landrecht*, law not for a particular class of persons holding military fiefs, but the general law of rights in land. This I think of great importance; the wide extension of the feudal idea deprives it of much of its most dangerous meaning; it does not create

a caste ; it has to serve for the tenant in socage, the agricultural classes as well as for the tenant by knight service. Many things in our legal history are thus explained, for instance, the growth of primogeniture. In origin it belongs to a military system ; slowly it spread from the military tenants to the socagers, it ceased to be the mark of a class, it became common law¹. How consistently the idea of tenure was carried through the whole land law, and how little that theory might mean, is best seen when we look at the tenure by frankalmoign. The monastery pays no rent, none of the ordinary profits of tenure can accrue to the lord, for his tenant never dies, never leaves an heir, never commits felony ; but to save the theory he is still a tenant holding by the service of saying prayers for the lord.

The Norman Conquest then introduces the general theory of tenure—makes it the theory of the whole land law. Also it draws tighter the bond which already is beginning to connect military service with the holding of land. Still we must not suppose that the Conqueror definitely apportioned the quantum of military service to be exacted from his feudatories. ‘We have,’ says Stubbs, ‘no light on the point from any original grant made by the Conqueror to any lay follower ; but judging from the grants made to the churches we cannot suppose it probable that such gifts were made on any expressed condition, or accepted with a distinct pledge to provide a certain contingent of knights for the king’s service. The obligation of national defence was incumbent as of old on all landowners, and the customary service of one fully-armed man for each five hides was probably the rate at which the newly endowed follower of the king would be expected to discharge his duty. The wording of the Domesday survey does not imply that in this respect the new military service differed from the old ; the land is marked out, not into knight’s fees, but into hides, and the number of knights to be furnished by a particular feudatory would be ascertained by inquiring the number of hides that he held, without apportioning the particular acres that were to

¹ This idea is worked out in the *History of English Law*, vol. II, pp. 260—73.

maintain a particular knight¹.’ This apportionment seems rather the result of the process of sub-infeudation. The great landowner whose wide estates oblige him to furnish a large body of knights parcels out the duty among his followers, definitely providing that A or B shall hold this parcel of land by the service of one knight or of three knights. The system seems hardly to have been worked into perfect detail until the feudal array was already losing some of its importance. The imposition of scutage in the reign of Henry II, the commutation of military service for money payment, makes every particular definite; the obligation can now be expressed in terms of pounds, shillings and pence. This district constitutes a knight’s fee; this is a fifth of a knight’s fee; when the scutage is two marks on a knight’s fee this land pays two shillings, and so forth. No general plan is imposed².

As regards what are generally called the burdens or incidents of feudal tenure—here again we ought not to think of William the Conqueror bringing over with him a fully developed law. The state of the English law when it becomes manifest in the pages of Glanvill and Bracton is the result of a slow process which went on during the eleventh and twelfth centuries, and which gradually defined the rights of lord and tenant. This process one can trace as regards each separate burden—relief, marriage, wardship, aids, scutages, and so forth. The final result we have already sketched. Some of our ordinary text-books encourage the notion that originally the English feudatories were merely tenants for life, but that in course of time, to use the common phrase, ‘fiefs became hereditary.’ Now it is perfectly true that long ago such a process as this had gone on abroad. The *beneficium* or *feodum* as it came to be called, was, to start with, only a life estate; but already in the ninth century the claim of the heir to inherit or take up his father’s fief had been generally admitted. There seems no doubt whatever that when the Conqueror gave English land to one of his great followers,

¹ *Constitutional History*, vol. 1, § 96. The number of knights does not seem to have borne any close relation to the size of the tenant’s estate. Round, *Feudal England*, p. 247 ff.

² For Maitland’s developed views on scutage see *History of English Law*, vol. 1, pp. 266—71, where it is proved that the tenant in chief could not commute his service.

the gift was in terms the gift of an hereditary estate—a gift to the donee and his heirs. Still doubtless the past history of the *beneficium* clung about the gift. The heir's claim, though an admitted claim, was still rather a claim to be placed in his ancestor's position, than a claim that by mere death and inheritance he was already in that position. He had a right to have the land, but the land was not as yet quite his. He must do homage and swear fealty; what is more, money may be expected of him if he is to fill the position of his ancestor. There is still something of grace and favour in letting him hold what his father held. We know little of what was the practice of the Conqueror himself; but it is plain that William Rufus would have liked to treat the feudatories as mere life tenants, to have insisted that the heir must repurchase the father's land, even that the new bishop or abbot must repurchase the land held by his predecessor. He wished, we are told, to be the heir of every man in England. His demands, however, were clearly regarded as oppressive and illegal. Henry I on his succession to the throne found it necessary to renounce the evil customs of his brother. The coronation charter in which he did this is one of the main landmarks in the history of English feudalism—even in the history of England. Thus in particular we have this clause: 'If any of my earls, barons or other tenants shall die, his heir shall not redeem (*redimet*, buy back) his land, but shall relieve it (take up the inheritance) by a just and lawful relief.' This, you will see, on the one hand declares in an emphatic way that fiefs are hereditary, while on the other hand it declares no less emphatically that a relief is due. The amount, however, is not fixed. It is to be remembered that something like the relief had been paid in England before the Norman Conquest—namely the heriot—and though (as I have already said) the heriot had originally been of a different nature (the return of the thegn's military equipment to the lord who provides it) it had come to look much like the foreign relief. The thegn had become a landowner; bound by special obligation to serve the king; on his death arms and money were rendered to the king:—a Norman accustomed to the beneficiary system would see here a relief. It is now very generally supposed that

Ranulf Flambard, the minister of William Rufus (of whose doings the contemporary chroniclers complain very bitterly), had much to do with shaping this part of English feudalism. The just and lawful reliefs of Henry's charter may have been equivalent to the heriots, a tariff of which is given in the laws of Canute. But it took a century and more from the coronation of Henry I to reduce the king's claims within any very definite bounds. What I have said of reliefs may be said also of those extremely onerous burdens which we know as wardship and marriage. The Coronation Charter of Henry I makes large promises about them, and lays down rules which are considerably less heavy on the tenants than those which ultimately become the rules of the common law. From the accession of Henry I to the Magna Carta of 1215 these matters are very unsettled—the king gets what he can, often he can get much. At length the Great Charter wrung from John sets precise bounds to his rights, though as a matter of fact another half century goes by before the charter is very carefully observed, and even the Great Charter is not in all respects so favourable to the tenants as is the charter of Henry I: this in particular is the case as regards wardship and marriage—the king's rights as ultimately fixed are, to say the least, very ample.

What has been said of the king and his tenants in chief is true also of the barons and their tenants. Henry I at the opening of his reign was compelled to throw himself on the whole nation for its support. His charter carefully stipulates that his behaviour to his tenants is to be the model for their behaviour to their tenants. They are to take no more than a just and lawful relief, and are to be content with such rights of wardship and marriage as suffice for the king. The rising, again, which won the charter of 1215, was distinctly a national rising, and the rights which were secured to the tenants in chief as against the king, were secured as against them for their tenants. The period from 1066 to 1215 we may regard as the age during which the feudal burdens are defined, partly by charters obtained by the king, partly by the practice of the king's exchequer, which gradually develops into a regular routine; but many points are unsettled, the king will take

what he can get, his tenants will pay as little as possible—will now and then revolt. In Glanvill's time, to give one example, the relief due from a knight's fee was fixed at 100 shillings; for socage land, one year's rent. He goes on to say that as to baronies no certain rule has been laid down, for baronies are relieved *juxta voluntatem et misericordiam domini regis*¹.

Let us now recount the limitations which are set in this country to the development of what can properly be called a feudal system.

(1) First and foremost, it never becomes law that there is no political bond between men save the bond of tenure. William himself seems to have seen the danger. We read that in 1086 he came to Salisbury, 'and there came to him his witan and all the landowning men that were worth aught from over all England, whosoever men they were, and all bowed themselves down to him and became his men, and swore oaths of fealty to him that they would be faithful to him against all other men.' He exacted an oath of fealty not merely from his own tenants, but from all the possessors of land, no matter whose men they were; they were to be faithful to him against all other men, even against their lords. This became fundamental law: we have before this seen its result; whenever homage or fealty was done to any mesne lord, the tenant expressly saved the faith that he owed to his lord the king. The oath of allegiance we find is exacted from all men; this exaction becomes part of the regular business of the local courts.

(2) English law never recognizes that any man is bound to fight *for* his lord. The sub-tenant who holds by military service is bound by his tenure to fight for the king; he is bound to follow his lord's banner, but only in the national army:—he is in nowise bound to espouse his lord's quarrels, least of all his quarrels with the king. Private war never becomes legal; it is a crime and a breach of the peace. Certainly there was a great deal of private war; certainly men felt it their duty to follow their lord against his enemies, even

¹ *Select Charters*, p. 163.

against the king; but this duty never succeeds in getting itself acknowledged as a legal duty. If that seems to you too natural to be worth mentioning, you should look at the history of France; there it was definitely regarded as law that in a just quarrel the vassal must follow his immediate lord, even against the king.

(3) Though the military tenures supply the king with an army, it never becomes law that those who are not bound by tenure need not fight. The old national force, officered by the sheriffs, does not cease to exist. Rufus had called it out for compulsory service; more than once it was called out against the Scots; in 1181 Henry II reorganized it by his Assize of Arms; it was reorganized again under Edward I by the Statute of Winchester in 1285; it is the militia of later days. Every man is bound to have arms suitable to his degree, down to the man who need but have bow and arrows. In this organization of the common folk under royal officers, there is all along a counterpoise to the military system of feudalism, and it serves the king well. The great families of the Conquest are at length pulverized between the hammer of the king and the anvil of the people.

(4) Taxation is not feudalized. The king for a while is strong enough to tax the nation, to tax the sub-tenants, to get straight at the mass of the people, their lands and their goods, without the intervention of their lords. When the time for putting a restraint upon his power comes, it is only for a brief while, if ever, the restraint of a purely feudal assembly of tenants in chief. The king deals with the smaller landowners in the county court, until at last the county court is represented at Westminster by knights of the shire. On the other hand, the king relying on the nation is strong enough to insist that the lords shall not tax their tenants without his consent.

(5) The administration of justice is never completely feudalized. The old local courts are kept alive, and are not feudal assemblies. The jurisdiction of the feudal courts is strictly limited; criminal jurisdiction they have none save by express royal grant, and the kings are on the whole chary of making such grants. Seldom, indeed, can any lord exercise

more than what on the continent would have been considered justice of a very low degree. The two counties palatine are exceptions; but one of these, Durham, is in the hands of a bishop, and the appointment of bishops is practically in the king's hands. As to Chester, our best representative of real feudalism; about the middle of the thirteenth century a series of lucky accidents brings the earldom into the king's own hands. The king again, as we have seen, rapidly extends the sphere of his own justice: before the middle of the thirteenth century his courts have practically become courts of first instance for the whole realm—from Henry II's day his itinerant justices have been carrying a common law through the land.

(6) The *Curia Regis*, which is to become the *commune concilium regni*, never takes very definitely a feudal shape. The body of tenants in chief is too large, too heterogeneous for that. It is much in the king's power to summon whom he will, to take the advice of whom he will. The tradition of a council of witan is not lost. Only slowly does a body of barons, or major barons, separate itself from the larger body of tenants in chief, and it long remains in the king's power to decide who these major barons are, who shall be summoned by name to his councils. The residue of the tenants in chief is not keen about going to court; gradually it is lost in the body of freeholders. When the time for a representative parliament has come, the smaller tenants in chief are mixed with their own sub-vassals, and the bodies which are represented by the knights of the shire are the county courts in which all freeholders find a place. The model parliament of 1295 follows closely on the great statute of 1290 (*Quia Emptores*), which puts a stop to subinfeudation, and vastly diminishes the public importance of tenure.

Speaking generally then, that ideal feudalism of which we have spoken, an ideal which was pretty completely realized in France during the tenth, eleventh and twelfth centuries, was never realized in England. Owing to the Norman Conquest one part of the theory was carried out in this country with consistent and unexampled rigour; every square inch of land was brought within the theory of tenure: English real property

law becomes a law of feudal tenures. In France, in Germany, allodial owners might be found : not one in England. Also the burdens of tenure were heavier here than elsewhere ; the doctrines of wardship and marriage were, I believe, severer here than in any other country in Europe. On the other hand our public law does not become feudal ; in every direction the force of feudalism is limited and checked by other ideas ; the public rights, the public duties of the Englishman are not conceived and cannot be conceived as the mere outcome of feudal compacts between man and lord.

PERIOD II.

PUBLIC LAW AT THE DEATH OF HENRY VII.

IT may seem strange to you that I should choose the year 1509 as our next point of view. Certainly it would be more in accordance with tradition were we to pause at 1399, the deposition of Richard II, the accession of the House of Lancaster; again at 1461, the accession of the House of York, and again at 1485, the accession of the House of Tudor. But for one thing our time is short. In the second place it is well to break with tradition even though that tradition be reasonable; we ought to accustom ourselves to review our constitution from many different points of view, and I do not wish to repeat exactly what is in the books that you ought to read. In the third place a moment of crisis, when, so to speak, our constitution is thrown out of gear, does not seem the best moment at which to halt in order that we may inquire what the constitution is,—the end of the four and twenty peaceful years during which Henry VII governed England seems to me a time at which we may profitably place ourselves in order to survey the permanent results of the eventful two centuries which have elapsed since the death of Edward I. The internal English history of these two centuries is very largely a history of the relation between king and parliament; that relation has varied very much from time to time, it has varied with the character of the kings, the character of the parliaments, it has been affected by foreign wars and by civil wars; still there is a certain permanent outcome, a constitution, a body of public law. Our first duty must be to consider what a parliament is.

A. *Parliament.*I. *Its Constitution.*

We find that the great precedent of 1295 has been followed, that assemblies modelled on the assembly of that year have been constantly holden, that these have quite definitely acquired the name of parliaments. Parliament is still, at least in theory, an assembly of the three estates; we must examine its component parts.

(i) *The Clergy.*

In the first place the two archbishops and the eighteen bishops are there, and as of old it may still be questioned whether they are there as holding baronies or as the heads of the national church. The number of abbots has sunk to 27; in 1305 it was as high as 75; but the abbots have insisted that unless they hold territorial baronies they are not bound to attend; they have cared little for national politics; no abbot has made himself conspicuous as a statesman; in 1509 their doom is at hand. The inferior clergy are summoned by means of the *praemunientes* clause; but they have systematically refrained from attending; they have preferred to vote their taxes in their convocations. In time their attendance has been required for the same purpose as that of the commons; they have been told to come *ad faciendum et consentiendum*; this was the form down to 1340; gradually it was supplanted by *ad consentiendum*, which in 1377 became the invariable form: a consent to legislation might be given by silence. We know that the clerical proctors did occasionally attend throughout the fourteenth century, but even when they appeared they apparently took but little part in the proceedings of the parliament.

(ii) *The Lords Temporal.*

The lords temporal are now divided into various ranks. In 1307 we had only to speak of earls and barons; but now above the earls there are marquesses and dukes, and between the earls and barons there are viscounts. The first English dukedom was created in 1337, when Edward III gave that dignity to the king's eldest son; the dukedoms of Lancaster, Clarence, Gloucester and York were bestowed

upon members of the royal house, and in 1397 Richard II gave dukedoms to some who were not members of that house. He also made our first marquess, Robert de Vere, marquess of Dublin. The title of viscount was not given until the fifteenth century. These titles were imported from abroad. They were at first used in order to give some nobleman a precedence over his fellows. They have never given more than this, and have been legally unimportant. They never implied any territorial power or jurisdiction over the place whence the title was derived. Even the old title of earl though always taken from a county or county town had long ceased to imply anything of the sort. The creation of these new dignities had, however, an important effect on the usual mode of creating peers. The dukes, marquesses and so forth were created by patent, that is, by letters under the great seal definitely giving this rank to them and their heirs. Hitherto, as we have seen, barons had not been created in this way, the writ summoning him or his ancestors to a parliament was all that the baron could show. In 1387 Richard II created a baron by patent: this example was occasionally followed, and from 1446 onwards was regularly followed. We thus get to the law of our own day, that a peerage must be created in one of two ways, either by writ of summons or by letters patent, and it may save repetition hereafter if we now trace this matter to an end.

Since the fifteenth century a patent has been the regular means of creating a new peerage: it is now the means invariably used. Such a patent usually confers the peerage, barony, earldom, dukedom, or whatever it be upon a man and the heirs male of his body. The House of Lords in 1856 advised the crown that a patent which gave no more than a peerage for life would not entitle the grantee to be summoned to parliament. A peerage created by patent must be descendible, inheritable: at this moment I can say no more, because to go further would be to enter the domain of real property law; but you will read more of it in Sir William Anson's book¹. I believe that it must be admitted that as a matter of fact ever since the practice of creating peers by

¹ *Law and Custom of the Constitution. Parliament, c. vi.*

patent had been in use no distinct precedent could be found for an attempt to make a man a peer without giving him an inheritable right; the decision of 1856 in the Wensleydale peerage case was to the effect that this practice had begotten a rule of law. But secondly I may claim a peerage and a right to be summoned on the mere ground that an ancestor of mine, whose heir I am, was once summoned and took his seat. It is held that a mere writ of summons directed to A.B., if obeyed by him, confers on him a right descendible to his heirs. Whether the kings of the thirteenth and fourteenth centuries meant that this should be so, may well be doubted, but on the whole the practice of summoning the heir was regularly observed, and in the sixteenth century the rule that summons and sitting gives a descendible right was regarded as fixed. A peerage may descend to a woman, although in modern times the patent usually prevents this by mentioning the heirs male of the body, or the king can confer a peerage upon a woman. Thus a woman may be a peeress in her own right. No woman however has ever, says Dr Stubbs, sat in a full and proper parliament. The nearest approach to such a summons is that of four abbesses who in 1306 were cited to a great council held to grant an aid on the knighting of the Prince of Wales.

We have before referred to the complicated question of barony by tenure. In 1509 the problem had not yet presented itself in any very definite shape. There can be no doubt that it was the general impression among both lawyers and others that the right to the writ of summons was in many cases still annexed to the holding of certain lands forming a barony. Such land baronies however were so seldom alienated that the question had hardly arisen whether the alienee or the alienor's heir would have the better right to the summons. Freehold lands, we must remember, could not as yet be given by will. As lands became more easily alienable the question was forced to the front and the decision was that the right to the summons was not annexed to the property in the land, and consequently could not be alienated.

Even when some definite rules as to the right to a summons were being evolved, the number of lords summoned

varied greatly owing to minorities, attainders, extinction of baronies and similar causes. Under Henry IV the number never exceeded 50, under Henry V it only once reached 40, under Henry VI it fell as low as 23 and reached 55, under Edward IV 50 was the maximum. The Wars of the Roses thinned the baronage, but not so much as is often supposed; only 29 lay peers were summoned to the first parliament of Henry VII, but in a few years the number again reached 40, though only five new peerages were created. It is well to remember this, for we are too apt to think of the House of Lords as an assembly of hereditary nobles. Throughout the Middle Ages the spiritual and non-hereditary peers must often have been in a majority; even when the number of abbots had sunk to 27 they, with the two archbishops and 28 bishops, could frequently have voted down the whole lay peerage.

We have been using the terms peers and peerage. These terms but gradually came into use during the fourteenth century. Originally of course *pares* only meant equals. A new significance is given to the term by a principle deeply imbedded in our old law, namely, that a man who is to be judged, must be judged by those who are at least his equals—the free man is not to be judged by villeins. Thus in *Leg. Hen. Prim.* 31 § 7, *Unusquisque per pares suos est judicandus*¹. So in feudal courts the vassal is not to be judged by sub-vassals. Thus a man's *pares* came to mean those who, standing on the same level with him, are competent to be his judges—the body of judges is the *pares curiae*, the body of peers which sits in the court in question. This principle, as we all know, is solemnly sanctioned by Magna Carta: the free man is not to be arrested nor imprisoned, disseised of his freehold, nor in any wise destroyed: *nisi per legale iudicium parium suorum vel per legem terrae*². These words are apparently borrowed from the constitutions of German emperors. Do not be persuaded that they have reference to trial by jury; the verdict of a jury, the testimony of a body of neighbour

¹ *Select Charters*, p. 100.

² M. C. c. 39. *History of English Law*, vol. 1, pp. 391—4. McKechnie, pp. 436—59.

witnesses, was in no sense a *judicium*. The demand is of a quite different kind; the barons want a court of their equals—they are to be judged by barons. Theoretically the *curia Regis* had probably been such a court; practically it had become something very different, a tribunal constituted by a few royal servants, some at least of whom were not of baronial rank, but were mere clerks and professional lawyers. The struggle of the barons for a *judicium parium* is a long one; it can be traced through the thirteenth century and in the end it is not very successful; against it the king opposes the assertion that his justices are good enough judges for any man. Ultimately it succeeds thus far, that the lords get a right to trial by lords in case of treason and felony; that is all; if they are to be tried for any lesser crime, any misdemeanour, the king's justices shall try them, and all their civil litigation comes before the king's justices. Even as to treason and felony the demand seems to have been often disregarded. The modern principle that I have just laid down is in truth a compromise—only in case of treason or felony has the peer any privilege. It seems to have been settled in the course of the fourteenth century. It required a statute of 1422 to secure the same privilege for noblewomen. Further, it should be observed that even in case of felony or treason there is a distinction—the peer accused of such a crime was tried by his peers in parliament, if parliament were then sitting, and the assembled lords are in such a case judges of both fact and law; but if parliament were not sitting, he was tried by a select body of peers chosen by the Lord High Steward, in what came to be called a Court of the Lord High Steward. The steward's office had at an early time become hereditary in the house of Leicester; it fell in to Henry IV and was merged in the royal dignity; thenceforth if a steward was wanted for the trial of a peer he was appointed for the occasion by the king; he chose a small body of lords, seemingly 23 was the usual number. In such a case the lords thus summoned were considered only as judges of fact, the Lord High Steward laid down the law. Not until after the Revolution of 1688 was it made necessary that all peers should be summoned to form the High Steward's

court, and then only in case of treason. It will probably strike you that the privilege of being tried by some lord nominated for the purpose by the king and a small selection of peers nominated by this royal nominee cannot have been a particularly valuable privilege, but this is all that the baronage got with all its strivings¹.

This privilege, however, served to define a class of peers or *pares*. It was not the only privilege of peerage. The peer enjoyed a certain freedom from arrest, he could not be arrested and imprisoned for debt, though he might be arrested and imprisoned upon a charge of felony or treason. It is well to observe how few were the privileges of peerage: how little of a caste was our estate of lords temporal. It became the fashion late in the day to talk of noble blood, of a man's blood being ennobled when he was called to parliament. But this is nonsense unless it be held that the ancestor's blood flows only to his heir, and unless the heir only begins to have his ancestor's blood in his veins when that ancestor dies. The sons and daughters of lords have from the first been commoners during their father's lifetime, and on his death only his heir becomes entitled to any legal privileges. Whatever social pre-eminence the families of peers may have, has no basis in our law: we have never had a *noblesse*. It has been asserted that bishops are not entitled to demand a trial by the House of Lords, on the ground that their blood is not noble. The House of Lords asserted this in 1692, and it is a very doubtful question what would now happen if a bishop committed felony or treason; but as a matter of fact, so soon as the word 'peers' came into use, the bishops were regularly recognized as peers of the land, and it is in the case of Archbishop Stratford in 1341 that we find the earliest definite formulation of the principle that peers are to be tried in parliament.

It is well to remember that during the Middle Ages the king had considerable powers over the constitution of what

¹ For further light on this subject see L. O. Pike, *Constitutional History of the House of Lords*, c. x; L. W. Vernon-Harcourt, *His Grace the Steward and Trial by Peers*, and *Law Quarterly Review*, vol. XXIII, pp. 442—7 and vol. XXIV, p. 43—8.

had come to be the upper House of Parliament. As to the lay peerage, even though usage hardening into law may have obliged him to summon the heir of the late baron, he had a power, to which the law set no limit, of creating new peers. This power was not, I think, very freely exercised; the advantage of a picked House of Lords was counterbalanced by the danger of creating new noble houses which would be dangerous to their creator. Over the spiritual part of the peerage the royal power was at least as great. The manner in which bishops were made had a long and complicated history. Theoretically the bishop ought to have been elected by the cathedral chapters; the Great Charter promised that such elections should be free; practically, however, the making of a new bishop was an affair for the king and the pope; if they worked together they had their way; when they quarrelled sometimes one, sometimes the other, was successful. When a see fell vacant the king sent the chapter his licence to elect (*congé d'élire*), accompanied by a letter (letters recommedatory) nominating the person who was to be elected. Under Henry VI, a weak and pious king, the pope had his own way; he provided bishops, though such provisions were contrary to English Acts of Parliament. Under Henry VII the royal nominees were invariably chosen. As to the abbots they were elected by the monks, and neither king nor pope often interfered with the election. As already said, the abbots play no distinguished part in parliament or politics.

(iii) *The Commons.*

First let us consider the knights of the shire. There are 37 counties returning two members apiece; Chester and Durham are not yet represented. We have seen that from the first the representatives were to be elected in the full county court. As to the mode of election during the fourteenth century we know little more than this; though we may gather from complaints of the commons that often enough the influence of the sheriff was all-powerful. It is but gradually that the counties appreciate the privilege of being represented, or that the duty of representing the county is regarded as an honour. In 1406 (7 Hen. IV, c. 15)

a statute directs that the election shall be made in the first county court holden after the receipt of the writ ; it is to be made in full county court. In 1410 (11 Hen. IV, c. 1) the conduct of elections is placed under the cognizance of the justices of assize, and a penalty of £100 is demanded against a sheriff who makes an undue return. In 1413 (1 Hen. V, c. 1) residence within the counties is made a qualification both for the electors and the elected. From 1430 we have the important act (8 Hen. VI, c. 7) which regulated the county franchise for the next four centuries:—the electors are to be persons resident in the county, each of whom shall have freehold to the value of 40 shillings per annum at the least above all charges. The act complains that elections have of late been made by ‘very great, outrageous, and excessive number of people, of which most part was people of small substance and of no value, whereof every of them pretended a voice equivalent as to such election with the most worthy knights and esquires.’ To start with, this must have been what would in our eyes be a fairly high qualification: the great change in the value of money caused by the discovery of silver in America rendered it in course of time very low and very capricious; the forty shilling freeholder had a vote, the copyholder, the leaseholder, had none, no matter how valuable his land might be. In 1432 another statute explains that the qualifying freehold must be situate within the county. The king at various times exercised a power of inserting clauses in the writs directed to the sheriff specifying the sort of persons who were to be chosen—generally they were to be two knights girt with swords; this order, however, seems to have been pretty generally disobeyed, many of the so-called knights of the shire were not knights—in 1445 it is considered sufficient that they should be knights of the shire or notable squires, gentlemen of birth, capable of becoming knights; no man of the degree of yeoman or below it is to be elected.

The number of knights of the shire was, we have seen, constant, that of the citizens and burgesses fluctuated, diminishing pretty steadily as time went on. For the maximum number of the boroughs represented we must go back to Edward I

when 166 was reached; during the first half of the fifteenth century it had fallen to 99. After 1445 it begins to increase a little, Henry VI added 8 new boroughs, Edward IV added or restored 5. It should be remarked that during the Middle Ages no writ was sent to the boroughs—the writ went to the sheriff of the county, commanding him to return two knights from his shire, two citizens from every city, two burgesses from every borough. It was much in his power therefore to decide what towns should be represented. The towns very often desired not to be represented. According to the regular practice a borough was taxed at a heavier rate than the shire—thus when a fifteenth was laid on the counties, a tenth was laid on the boroughs; also if a borough sent burgesses to parliament it had to pay their wages. In one case, that of Torrington, in 1368, we find a borough successfully petitioning the king that it may not be compelled to send members. It is very probable that other boroughs effected the same object by negotiations with the sheriff. A statute of 1382 (5 Ric. II, c. 4) denounces a punishment against the sheriff if he omits boroughs which have heretofore sent members. During the fifteenth century the privilege of being represented seems to have been a little more highly prized. We find the king conferring the right to send members upon new boroughs, or restoring it to boroughs which have been represented in former times. This power made it possible for the king to pack the House of Commons; but we do not find it liberally exercised until the reign of Mary. The first House of Commons of Henry VIII consisted of 298 members—74 members for the shires, 224 for the cities and boroughs. The number of borough members had largely exceeded that of the knights of the shire, nevertheless through the Middle Ages it is the knights of the shire who are the most active and independent element in the parliament; every movement proceeds from them—to them it is due that the House of Commons takes its place beside the House of Lords.

As to the qualification of electors in the boroughs, we have seen that from the first it had varied from borough to borough. Lapse of time had done nothing to make it more uniform; quite the reverse, no general law was made and

each borough was left to work out its own destiny by the aid of charters purchased from the king. The only general principle that can be laid down is this, that the later the charter the more oligarchic is the constitution of the borough. A few towns acquired the right of being counties of themselves, of having their own sheriffs, and being exempt from the powers of the sheriff of the surrounding county. London had acquired this privilege under Henry I—no other town succeeded in getting it until Bristol became a county in 1373. York followed in 1396 and then Newcastle, Norwich, Lincoln, Hull, Southampton, Nottingham, Coventry, Canterbury. In such cases the writs were sent to the sheriffs of these counties corporate and in some of them the county qualification, the forty shilling freehold, was adopted as the qualification for the electors. In other boroughs the qualification varies between a wide democracy and the narrowest oligarchy.

Long ago parliament had taken the shape familiar to us, an assembly consisting of two houses which sit, debate, and vote apart—the one containing the lords, spiritual and temporal, the other all the representatives of the commons. How high this separation can be traced has been disputed; there is no doubt that we can carry it back to the middle of the fourteenth century:—as regards the preceding half century there is some doubt, but Stubbs holds that very probably from the very first moment the lords and commons sat apart. In the later Middle Ages they certainly sat in separate buildings, the lords in the Parliament Chamber of the king's palace, the commons generally in the Chapter House or the Refectory of the Abbey of Westminster. Westminster had long ago become the usual seat of parliament, though during the fourteenth and fifteenth centuries there were a not inconsiderable number of sessions at York and other towns; it was for the king to decide when and whether he would summon a parliament. It is a noticeable fact that at a very early time, perhaps from the very beginning, the citizens and burgesses sit together with the knights; there seems certainly for a long while a feeling that as it is for the barons to tax themselves, and for the clergy to tax themselves, so the boroughs should be taxed by burgesses and the county by knights of

the shire ; and as a matter of fact the boroughs and counties are usually taxed at different rates—a 10th is imposed on boroughs, a 15th on counties : nevertheless we soon find that the two sets of representatives act together—they are regarded as representing but one estate of men, the commons of the realm.

The members of the common's house were paid wages by their constituents ; the knights of the shire received four shillings a day, the burgesses two shillings ; in 1427 we find the townsmen of Cambridge making an agreement with their members to take one shilling.

It is worth looking at the words of the writs whereby a parliament is summoned ; they bring out the fact that the two houses had not originally been co-ordinate assemblies ; a lord is told that the king intends to hold a parliament at a certain place and time, *et ibidem vobiscum et cum ceteris prelatiis, magnatibus, et proceribus regni nostri colloquium habere et tractatum* ; he is then enjoined, *in fide et ligeancia quibus nobis tenemini*, if he be a temporal lord, *in fide et dilectione*, if a spiritual lord to be present *cum prelatiis, magnatibus, et proceribus praedictis super praedictis negotiis tractaturi, vestrumque consilium impensuri*. A writ to a judge or to another councillor who is not a peer omits the word *ceteris*—he is not one of the magnates or *proceres* of the kingdom, and the opinion is growing, as we have before said, that he had no vote, and indeed no voice in debate, but is simply to give his advice if that is wanted. But the function of the lords as distinguished from that of the commons is marked by the words *tractaturi vestrumque consilium impensuri* ; they are to treat with the king and give their counsel. The writ to the sheriff recites the king's intention of treating with the lords, the *prelati*, *magnates*, and *proceres*, and then directs the election of knights, citizens and burgesses who are to have power on behalf of their constituencies, county, cities, boroughs, to consent to and to do what may be determined by the common counsel of the kingdom—*ad faciendum et consentiendum hiis quae tunc ibidem de communi consilio regni nostri favente domino ordinari contigerit super negotiis antedictis*. They are not to treat with the king ; it is not their counsel

that the king wants, it is their consent—an active consent which shall be extended to doing (*ad faciendum*) what shall be determined by the common counsel of the kingdom. As to the clergy, we have already seen that from the time of Richard II onwards the word *faciendum* drops out of the *praemunientes* clause—they will not come to parliament—their absence will be consent enough.

II. *Frequency and Duration of Parliament.*

Such then is a parliament:—but how far is it necessary that there should be parliaments, and have parliaments been frequently and regularly holden? The question of law is intimately connected with the question of fact. Starting with the assembly of 1295 parliaments soon become very frequent. Already in 1311 one of the ordinances decreed that there should be a parliament twice in every year; but this was part of a baronial scheme and it may be doubted whether more than an assembly of barons was desired; but when in 1322 Edward II had succeeded in casting off the yoke of the baronial ordainers, the ordinances were repealed on the plea that the consent of the estates had not been given. The parliament of that year, 1322, published the following noteworthy declaration, the first declaration we may say of the supremacy of a full representative parliament—‘the matters which are to be established for the estate of our lord the king and of his heirs, and for the estate of the realm and of the people shall be treated, accorded and established in parliament by our lord the king and by the consent of the prelates, earls and barons, and the commonalty of the realm, according as hath been heretofore accustomed.’ In 1330 at the beginning of the new reign we have a statute for annual parliaments (4 Edw. III, c. 14). It is accorded that a parliament shall be holden in every year, or more often if need be. There can, I think, be little doubt that these words require that there shall be a parliament at least in every year—if need be parliament may be held more often, but at least once a year it must be holden. The slight ambiguity of the phrase should be noticed—it becomes important hereafter. In 1362 (36 Edw. III, c. 10)

another statute ordains that 'a parliament shall be holden every year, as another time was ordained by statute.' These provisions were fairly well kept for a long while; but there were no parliaments in 1364, 1367, 1370, between 1373-6, 1387, 1389, 1392, 1396, or between 1407-10. On the other hand in a considerable number of years there were two parliaments, in 1340 there were three, in 1328 four. Each of these parliaments, you should understand, was a new parliament, involving a new election. The time was not yet when the same parliament would be kept alive year after year by means of prorogations. The frequency of parliaments, if theoretically secured by the statutes just mentioned, was practically secured by the king's need of money. He was coming to be very dependent on supplies granted to him by parliament, and seldom was a tax imposed for more than a single year. Under Edward IV, however, parliaments grow much less frequent; in his reign of twenty-two years he held but six; five years passed without any parliament. A considerable revenue from the customs duties known as tonnage and poundage had been granted to Henry V for his life; this grant was repeated in the reign of Henry VI and of Edward IV; Edward also had other means of getting money, of which hereafter. Henry VII seems to have meant to rule like his Lancastrian ancestors by means of constant parliaments; before 1498 he had held six parliaments; thenceforward to the end of his reign there was but one session, namely in 1504. The statutes of Edward III, however, remained on the statute book, and very important they became at a future time. I am not sure, however, that Edward IV and Henry VII were considered by their contemporaries to be breaking the law in not holding annual sessions, however illegal might be the means which enabled them to get on without parliament. From our present standpoint then we see that the letter of the statute book probably requires annual parliaments; we see, however, what is more important than this, that for the last two centuries parliaments have, as a matter of fact, been very frequent, though their frequency has somewhat decreased of late years.

III. *Business of Parliament.*

And now for what purposes were parliaments necessary? It is with no general statement of the sovereignty (in the modern sense) of the body composed by the king, the lords and the representatives of the commons, that we must begin our answer. Such a theory there cannot be, at least to any good purpose, until a foundation of fact has been laid for it, until the body thus composed has habitually and exclusively exercised the powers of sovereignty. We have to see how this foundation of fact was gradually laid, and we have to remember that at the beginning of the fourteenth century the king in parliament was by no means the only possible claimant of sovereign power. Representatives of the commons had but newly been called to meet the prelates and barons. Looking back now it may seem to us quite possible that sovereignty will ultimately be found to be in the king and the baronage, or in the king and his council, or again in the king alone.

(i) The field of work in which the cooperation of a parliament seems most necessary is that of taxation. In 1297 the principle has been enounced that the common consent of the realm is necessary to the imposition of aids, prises, customs: saving the king's right to the ancient aids, prises and customs. The highroad of direct taxation is thus barred against the king, though at least one bypath is open. The right to tallage the demesne has not been surrendered, and in 1304 Edward I exercised that right. Edward II did the same in 1312, and so did Edward III in 1332. But on this occasion parliament remonstrated and the king had to give up his project. This seems the last attempt on the king's part to set a tallage. In 1340 (14 Edw. III, stat. 2, c. 1) a statute was obtained which declares that the people shall be no more charged or grieved to make any aid or sustain any charge, if it be not by the common consent of the prelates, earls, barons and other great men and commons of the realm and that in the parliament. Just at this time too the scutage, the composition for military service, was becoming unprofitable and obsolete, it belonged to an age which had passed away.

Aids for knighting the king's son and marrying his daughter could still be collected ; but the amount of these was fixed by statute in 1350, expressly applying to the king the rule laid down for other lords (1275), namely 20 shillings from the knight's fee, and 20 shillings from £20 worth of socage land. These were an insignificant resource. On the whole, therefore, before the middle of the fourteenth century it was definitely illegal for the king to impose a direct tax without the consent of parliament.

The history of indirect taxation is more complicated. However, customs on wool, wine and general merchandise were levied in the twelfth century. Magna Carta says that merchants are to be free from any 'maletolt' or unjust exaction, saving the ancient and right customs which are referred to as well known things. In 1275 parliament grants to Edward a certain definite custom on wool ; but during the reigns of the first two Edwards the regulation of the customs is still constantly in dispute between the king and the nation. There is considerable danger that the king will get his way ; it takes some little reflection to see that indirect taxes, such as customs duties, are taxes at all :—if the king can by negotiation, by grants of privileges, induce the merchants to grant him such dues, may he not do so—is not this a matter between them and him ? The commons however seem early to have seen to the bottom of this question. Edward III had to make important concessions. In 1362 (36 Edw. III, stat. 1, cap. 11) it is provided that no subsidy or other charge should be set upon wool by the merchants or by any one else without the assent of parliament. In 1371 (45 Edw. III, c. 4) no imposition or charge shall be set upon wools, woolfells or leather, without the assent of parliament. This was re-enacted in 1387 (11 Ric. II, c. 9) but with a saving of the king's ancient right. The legislation on this subject of indirect taxation is not quite so emphatically clear as that which forbade direct imposts—some loopholes were left—still we may say that before the end of the fourteenth century the contest was at an end. There were at least no obvious ways in which the king could tax the community without breaking the law. The Lancastrian kings seem to have admitted

this. Even Edward IV may be said to have admitted it; in his reign it is that we begin to hear of benevolences, extorted freewill offerings. A statute of the only parliament of Richard III (1483, 1 Richard III, c. 2) was designed to stop this gap. The commons complain of new and unlawful inventions—of a new imposition called a benevolence—and it is ordained that the subjects be in nowise charged by an imposition called a benevolence or any such like charge, and that such exactions shall be no example, but shall be damned and annulled for ever.

Under the Tudors the danger is of a different kind—it is not so much that the king will tax without parliamentary consent, but that parliament will consent to just whatever the king wants and will condone his illegal acts. Thus in 1491 Henry VII had recourse to a benevolence which brought him in a large sum. Very possibly the act of Richard III was considered null as being the act of a usurper, though it remained upon the statute book. But at any rate the parliament of 1495 made this benevolence lawful *ex post facto*; the king was empowered by statute to enforce the promises of those who had promised money but not yet paid it. Such an act, extremely dangerous as it was to the liberties of the nation, was none the less a high exercise of parliamentary sovereignty—parliament undertook to make legal what had been illegal. That is one peculiarity of the Tudor time and a very remarkable one; parliaments are so pliant to the king's will that the king is very willing to acquiesce in every claim that parliament may make to be part of the sovereign body of the realm. All the statutes against taxation by virtue of prerogative are left unrepealed upon the statute book, to bear fruit in a future age—at present the king has no need to wish them repealed.

But not only had parliament repeatedly asserted that taxes were not to be imposed without its consent, it had also exercised to the full a power of imposing taxes of all kinds, both direct and indirect. Further as regards taxation, the House of Commons had won a peculiar importance. We have to remember that, to start with, there are in theory three estates of the realm: (1) clergy, (2) lords, and (3) commons.

On this theory it would be reasonable that each estate should tax itself; and this for some time takes place—the clergy make a grant, the lords another, the commons another. But before the end of the fourteenth century the lords and commons join in a grant, and a formula is used which puts the commons (upon whom the bulk of taxation falls) into the foreground—the grant is made by the commons with the assent of the lords spiritual and temporal. This form appears in 1395 and becomes the rule. In 1407 Henry IV assented to the principle that money grants are to be initiated in the House of Commons, are not to be reported to the king until both Houses are agreed, and are to be reported by the Speaker of the Lower House. Thus a long step has already been made towards that exclusive control over taxation which the House of Commons claimed in later ages—the taxes upon the laity are granted by the commons with the lords' assent. On the laity—the clergy still tax themselves in their convocations and no act of the parliament is as yet requisite to give validity to such a tax; to this extent the theory of the three estates still prevails; as a matter of fact, however, the convocations pretty regularly follow the example of the commons, making a corresponding grant to that which the commons have made.

Another point of importance is this, that during the Middle Ages permanent taxes are very seldom imposed. In general a tax is granted just for this occasion only: the king is granted a tenth of movables, or a customs duty, or it may be a poll tax just to meet the present demands upon his resources. Sometimes taxes are granted for two or three years to come, but this is rare. This renders an annual parliament a practical necessity, particularly after the long war with France has begun: every year now the king wants money, and can only get it by summoning a parliament. His non-parliamentary revenue which comes from his demesne lands, his feudal rights and so forth, is quite insufficient to meet the drain of a war. Some of the customs duties were permanent taxes. In 1414 parliament granted to Henry V tonnage and poundage for his life. No similar grant for life was made to Henry VI until 1453—the 31st year of his reign

—but they were granted for life to Edward IV in 1465, to Richard III in 1484, and to Henry VII by his first parliament. Such repeated grants of permanent taxes were dangerous precedents, as we find when we come to the reign of Charles I.

Henry VII, it is said, left behind him a treasure of £1,800,000. Edward IV also had been rich. Their predecessors had been habitually poor. The Wars of the Roses were in a great degree due to the poverty of Henry VI—he could not afford to govern the country thoroughly. This change in the king's financial circumstances is of course a very important matter—it absolves him from the necessity of convoking parliament. In two-and-twenty years Edward IV held but six parliaments; Henry VII held but seven parliaments during his 24 years. Whence did he get his treasure? To a large extent it would seem from the escheats and forfeitures consequent on the Wars of the Roses; to a large extent also by pressing to their uttermost the crown's claims for fines. It was believed that his ministers, Empson and Dudley, had trumped up all manner of accusations for the purpose of swelling the revenue, and were guilty of unjust exactions under colour of the feudal rights to reliefs, wardships and marriage. At the beginning of the next reign they were sacrificed to the popular outcry.

One of the burdens which has lain heavy on the mass of the people has been that of purveyance and preemption, the right of the king and his servants to buy provisions at the lowest rate, to compel the owners to sell, and to pay at their own time—which often enough meant never. It was an admitted royal right; over and over again parliament had sought by statute to bring it within reasonable bounds and to prevent abuses of it. Legislation begins with Magna Carta and goes on through the Middle Ages; one sees in such legislation at once the admitted claim of parliament to set limits to royal rights, and on the other hand the extreme difficulty that there is in getting the king to observe any laws which make against his pecuniary interests.

In another direction parliament has interfered with finance. In the first place it has claimed the power to appropriate the

supplies granted to the king, to say that they shall be spent in this or that manner. Already in 1348 the money is to be applied to the defence against the Scots, in 1353 to the prosecution of the war. In 1390 there is more elaborate appropriation out of the 40 shillings laid on the sack of wool, 10 shillings the king may have for his present needs, while the other 30 shillings are only to be expended in case of the continuance of the war. This practice is continued with increasing elaboration under the Lancastrian kings. But it is one thing to say that money shall only be spent in this way, another to prevent its being spent in other ways. Parliament begins to demand the production of the royal accounts; we hear of this in 1340 and 1341. In 1377 two persons are appointed by parliament to receive and expend the money voted for the war. In 1379 the king presented his accounts, and thenceforward treasurers of the subsidies were regularly appointed in parliament to account to the next parliament. In 1406 the commons were allowed to choose auditors; Henry IV told them that 'kings do not render accounts,' but in the next year he rendered them. But the principle had to be contested over and over again; it was a principle of no value unless parliament had a will of its own which it would exert year by year—this the parliaments of Edward IV and Henry VII had not.

(ii) We turn from finance to the wider subject of legislation. First let us observe, what is of great importance, the legislative formula of a statute. In the reign of Henry VII it has come to be almost exactly what it is at the present moment. 'The king our sovereign Lord Henry VII at his Parliament holden at Westminster...by the assent of the Lords spiritual and temporal and the commons in the said parliament assembled and by the authority of the same parliament hath done to be made certain statutes and ordinances in manner and form following.' It is the king's act, done with the assent (sometimes the form runs 'advice and assent') of the lords spiritual and temporal and commons in parliament assembled and by the authority of the said parliament. These last words are pretty new, 'by the authority of the same parliament'; they occur, it is said, for the first time

as a part of the preamble in 1433, although they occur in a more casual way as early as 1421. It is admitted therefore that a statute derives its authority from the whole parliament. Also we observe that the commons now stand on the same footing as the lords; their function in legislative work is of the same kind—they give advice, assent and authority. But this form has not always been used. Throughout the fourteenth century the commoners generally appear in a subordinate position—the statute is made by the king with the assent of the prelates, earls and barons, and at the request of the knights of the shire and commons in the said parliament: sometimes it is at the instance and special request of the commons—occasionally the assent of the commons is mentioned. This becomes more common in the fifteenth century; in 1435 and 1436 we have ‘by the advice and assent of the lords at the special request of the commons’; in 1439 ‘by the advice and assent of lords and commons’; and this form is used for several years. But in 1450 we revert to ‘advice and assent of lords and request of commons’—we get the one form in 1455, the other in 1460. Throughout the reign of Edward IV the two are promiscuously used. It is not until the House of Tudor is on the throne and the Middle Ages are at an end that all trace of the original position of the commons has vanished. Nevertheless it had long been admitted that the assent of the commons was necessary in order to give to a legislative act the quality of a statute—that this was necessary at least if the law was to deal with temporal affairs.

Let us first take the point raised by these last words. We have to remember that at starting the commons could hardly claim any higher place than that of the clergy, and we must remember that the theory of the time partitioned human affairs into two provinces—spiritual and temporal. It must long have remained a doubtful question whether the king, with the advice of the lords, could not make a statute on the petition of the clergy, just as well as on the petition of the commons—if the statute deals with the state the voice of the commons must be heard, if with the church the voice of the clergy. Practically the clergy solved the difficulty by neglect-

ing to accept the place that was offered them in the national assembly ; but there are not wanting some signs that in the fourteenth century the accepted theory allowed the king to make a statute with the assent of the lords on a petition of the clergy without consulting the commons. In 1377, however, the commons definitely demanded that neither statute nor ordinance should be made on the petition of the clergy without the consent of the commons: this demand seems to have been tacitly conceded. Turning to the other side of the theory, it does not seem to have been very seriously contended that legislation approved by lords and commons required also the consent of the clergy ; but still the practice of summoning them to parliament seems to have been maintained chiefly in order to prevent their asserting that they were not bound by laws to which they had not consented. The fact that the prelates were a majority in the House of Lords prevented collisions between church and state, and was a guarantee that the interests of the clergy would not be neglected. It is worth notice, however, that, from an early time, the lords spiritual and temporal were conceived as forming one body—a statute might be made though the prelates had voted against it. In 1351 they withheld their assent from the statute of Provisors ; they are not mentioned in it as consenting parties, but still it was a statute.

And now to the larger question as to the whereabouts of legislative power. We have seen that already in 1322 the principle was announced that legislation required the consent of the prelates, earls, barons and commonalty of the realm. Such consent was necessary for a statute ; and from that time onwards it seems an admitted principle that the consent of both houses was necessary for a statute : for a long time to come indeed the function assigned to the commons was, as we have seen, that of petitioning, not that of advising or assenting ; but of course 'petition' is assent and something more. But then we have to notice that a statute was not the only known form of legislation ; we have to distinguish it from an ordinance. Now from Edward I's day onwards a set of rolls known as statute rolls was kept. What was entered upon them was a statute, and by the beginning of Edward III's

reign it was an established principle that nothing was to go on to the statute roll save what had received the consent of king, lords and commons. We cannot apply this to earlier times; we to this day receive as statutes many laws made by Edward I in assemblies to which, as far as we know, no representatives of the commons were summoned; it is exceedingly doubtful whether those two pillars of real property law, the *Quia Emptores* and the *De Donis Conditionalibus*, were made with the assent of any such representatives. However, the principle is conceded under Edward II. But although it be allowed that a statute may require the consent of both houses, this does not decide that in no other manner can laws be made. Beside the statute there might be room for ordinances made by the king with the advice of the lords, or made by the king in his council. 'Great councils,' *magna concilia*, are still held under Edward II and Edward III, meetings of the king and his council with the lords spiritual and temporal. Such assemblies, however, are chiefly held for deliberative purposes—they were not serious rivals for parliament; on the whole the royal will was likely to find the lords as intractable as the commons. The rival that parliament had seriously to fear was the king in council. Now it seems to have been admitted during the fourteenth century that the king in council enjoyed a certain amount—or rather an uncertain amount—of legislative power. He could not revoke or alter statutes; he did so on more than one occasion, but this was generally regarded as an abuse. But without revoking or overriding statutes there was still a field for legislation; regard being had to past history we cannot be surprised at this. We find that parliament acknowledges the existence of this subordinate legislative power, even on occasions desires that it may be used. A statute is regarded as a very solemn affair, not easily to be repealed; temporary legislation, legislation about details, should be by ordinance. As time goes on, however, the existence of two legislative powers leads to frequent disputes. Richard II presses the ordaining power beyond all bounds: 'What is the use,' asks a contemporary, 'of statutes made in parliament? They have no effect. The king and his privy council habitually alter and efface what has pre-

viously been established in parliament, not merely by the community but even by the nobility¹. In 1389 the commons pray that the chancellor and council may not make ordinances contrary to common law and statute. The king answers that what has been done shall be done still, saving the king's prerogative. Richard had a theory of absolute monarchy, and he was deposed. One of the charges against him was that he had said that the laws were in his own mouth and often enough in his own breast. The Lancastrian kings were kings by Act of Parliament; they meant to rule and did rule by means of parliaments. Under them we hear few complaints about the ordaining power—they seem to have used it sparingly. At the close of the Middle Ages its limits are still very indefinite; in this lies one of the great dangers for future times. The king, it is clear, cannot revoke or override a statute, at least in a general fashion; but still by ordinances made in his council he has a certain power of adding to the law of the land. We have been obliged to say that he cannot override a statute in a general fashion. But here again is another danger—is there a dispensing power?—can the king exempt this or that person from the scope of a statute? That he has some such power it is difficult to deny; parliament has quietly submitted to its exercise; as regards certain statutes the king has habitually exercised it, has given his license to A.B. to do something forbidden by statute: in particular the anti-papal statutes have habitually been dispensed with, so have the statutes of mortmain which forbid religious bodies to acquire land. What is the limit to this power? It is hard to say. The question is made the more difficult by this, that very often the sanction established by the statute is some fine or forfeiture of which the king is to have the benefit—may not the king renounce this benefit in advance, may he not say that he will not exact it from A.B. if A.B. infringes the statute? It is difficult to say that he may not. Two indefinite powers, an ordaining and a dispensing power, are at the end of the Middle Ages part of the king's inheritance.

Another point connected with these last questions has been cleared up. Throughout the fourteenth century there is danger

¹ Walsingham, II, 48. Stubbs, *Constitutional History*, vol. II, § 292.

that though the king, with the lords' assent, grants the petition of the commons, the consequent statute will by no means do just what the commons want. The statute is not drawn up until after the parliament is dissolved; its form is settled in the king's council, and it may not correspond very closely with the petition. The commons over and over again protest against this; the petitions are tampered with before they are turned into statutes. In 1414 this point is conceded. The commons pray 'that there never be no law made and engrossed as statute and law neither by additions nor diminutions by no manner of term or terms the which should change the sentence and the intent asked.' The king in reply grants that from henceforth 'nothing be enacted to the petition of the commons contrary to their asking, whereby they should be bound without their assent¹.' Thus gradually the practice is introduced of sending up to the king not a petition but a bill drawn in the form of a statute, so that the king shall have nothing to do save to assent or dissent. This became the regular practice, and under Henry VII was adopted in most cases of importance².

It is needless to say that the king still retains and often exercises the power of refusing to legislate. A statute is still very really and truly the king's act. The form of assent has already become what it still is *le roy le veut*; the form of dissent is *le roy s'avisera*—a civil form of saying No, but a form not unfrequently used.

It should be remembered that legislative power is by this time a power that has been constantly and freely exercised. The statute book is already a bulky volume. King and parliament have taken upon themselves to interfere with every department of law—even to regulate the wages of labourers, the price of commodities, the dress which may be worn by men and women of different stations in life. The statutes of Edward III and Richard II have hardly the deep permanent interest which we find in the statutes of Edward I; they do not in the same way go to the very root of the

¹ *Rot. Parl.* vol. II, 22.

² The change took place about the end of the reign of Henry VI. Stubbs, *Constitutional History*, vol. II, § 290.

ordinary law, the land law, the law of civil procedure; still they are very miscellaneous and high-handed. Under the Lancastrian kings there is less legislation—this is one of the causes of their fall: the maintenance of peace and order is not sufficiently attended to—the great men are becoming too great for the law. The few parliaments of Edward IV do little. Under Henry VII, though parliaments are few, still they pass valuable statutes; it is recognized that a good deal of the medieval common law sadly needs amendment—there are new wants to be attended to—and above all order is to be re-established and preserved.

B. *The King and his Council.*

The succession to the throne has had a stormy history. Before the end of the fourteenth century two kings have been deposed, and one king has succeeded to the throne who, according to our ideas, had no hereditary right. A modern constitutional lawyer has no great difficulty with the case of Edward II, he can say that Edward resigned the kingdom and that he was at once succeeded by his rightful heir; if this be a precedent at all, it is a precedent for what should happen in case a king abdicates. Still there can, I think, be little doubt that the parliament which met in January, 1327, conceived that it had full power to depose a worthless king. It had been summoned in a way which was at least outwardly regular—the king was in fact a captive in the hands of Isabella and Mortimer—the great seal was in their power and the summons was issued in the king's name. The proceedings, however, were tumultuary. In the midst of a noisy mob it was resolved to reject the father in favour of the son. Articles justifying the deposition were drawn up—the charges are very vague and general, amounting to this, that Edward was incompetent and incorrigible¹. His resignation was then procured. On the whole, as it seems to me, these proceedings, so far from strengthening the notion that a king might legally be deposed, demonstrated pretty clearly

¹ Stubbs, *Constitutional History*, vol. II, § 255.

that there was no body empowered by law to set the king aside. The device of issuing writs in the king's own name, to summon the parliament which is to depose him, the extortion of a formal resignation, make the case rather a precedent for revolution than a precedent for legal action¹.

We come now to the events of 1399. The deposition, for such for a moment we may call it, of Richard II, has, I think, a greater constitutional significance than the deposition of Edward II—that is to say, the complaints against him which found expression in a series of formal charges, are not vague complaints of badness and uselessness, but accuse him of having broken the law. He has tried to play the absolute monarch; he has been acting on a theory of the kingship which is contrary to our laws—he has said that the laws were in his own mouth and often in his own breast, that he by himself could change and frame the laws of the kingdom, that the life of every liegeman, his lands, tenements, goods and chattels, lay at his royal will without sentence of forfeiture, and he has acted on these sayings. The revolution, if such we call it, is in this case a protest against absolutism. We must not plunge into the general history of the time; the forms observed are what chiefly concern us. Henry of Lancaster had landed, the nation as a whole had determined that he should be king—Richard had no party, made no serious effort, delivered himself up to Henry, and offered to resign the crown. A parliament was then summoned, the writs being attested by Richard and the council. It was proposed that the king should execute a deed of resignation before the parliament met. It was objected that in such case the parliament would be dissolved so soon as it met by the act of resignation. The expedient was then adopted of issuing new writs on the day on which the resignation was declared, summoning the parliament to meet six days later.

¹ It will not be impertinent to mention that the idea of an heir inheriting, while yet his father is physically alive, was not unfamiliar to our medieval law. There was such a thing as civil death. If a man entered religion—that is to say became a monk—he died to the world; his heir at once inherited, his will took effect, and his executors might sue for debts that had been due to him. It might well be considered that a king who had abdicated was dead to the law. F. W. M.

Before the Parliament met Richard executed a formal deed of abdication, renouncing all royal rights, and absolving all his people from homage, fealty and allegiance, and declaring himself worthy to be deposed. On the meeting of parliament the deed was produced. The question was put whether it should be accepted. It was accepted. The long list of charges was read, and parliament voted that they formed a good ground for deposing the king and that *ex abundanti* they would proceed to depose him. A sentence was then drawn up and read declaring that Richard was deposed from all royal dignity and honour. Commissioners were then sent to read this sentence to him. Apparently it did not enter the heads of any concerned that the estates lawfully summoned could not depose a king for sufficient cause—though he had resigned, they put it to the vote whether his resignation should be accepted and *ex abundanti*, as they said, proceeded formally to depose him. Perhaps they feared to let the matter rest upon an act of resignation, for this might leave it open for Richard to say at some future time, and not without truth, that the act was not voluntary, but had been extorted from him by duress. Still the deposition could really stand on no better footing than the abdication; if Richard was coerced into resigning he was coerced into summoning the parliament, and only by virtue of the king's summons had the parliament which deposed him any legal being. This perhaps is the reason why very soon afterwards Richard disappears from the world.

Richard deposed, Henry formally claimed the crown as descended in the right line of descent from Henry III and as sent by God to recover his right, when the realm was in point to be undone for default of governance and undoing of the good laws. It was proposed and carried that he should be king. The fact that Henry IV should have, though in vague terms, asserted an hereditary right is certainly important—showing, as it does, that there was by this time a strong sentiment in favour of strict descent. He seems to have stooped to encouraging the story which had been trumped up that his ancestor, Edmund of Lancaster, was the firstborn son of Henry III—older therefore than Edward I. A title

as heir to Richard II or Edward III he did not assert. Such an assertion would have opened a grave problem. Of course according to what became the orthodox legal theory the House of York had a better right. It traced its title to Lionel of Clarence, a son of Edward III, older than John of Gaunt, from whom Henry was descended—but then it had to trace this title through a woman, through Lionel's daughter Philippa. Now certainly the analogies of private law were by this time in favour of the daughter of an elder son. But it is to be remembered that a title to the crown of England had not yet been transmitted by a woman, except in the case of Henry II, whose right came to him through his mother the Empress. But in that case the only competitor was Stephen. Stephen himself claimed through a woman. It was quite possible therefore to contend that so long as there was a male claiming solely through males, no woman, and no man claiming through a woman, could be admitted. In favour of that doctrine Fortescue, chief justice under Henry VI, wrote an elaborate treatise; he was prepared to defend his master's title even as a matter of pure hereditary right. But Henry IV at his accession seems to have shrunk from raising this question; he sought to evade it by hinting at a title derived through his mother and Edmund of Lancaster from Henry III. However, it is to be noticed that in 1399 and for many years afterwards we hear nothing of the Yorkist claim, those who have what we regard as the best blood in their veins acquiesce cheerfully in the parliamentary settlement; the Earl of York lives in close friendship with Henry V. There is no impression, at least no general impression, that the transactions of 1399 were not perfectly lawful or that the parliamentary title of the Lancastrian kings is disputable. Had Henry V left a decently competent son, even had Henry VI married any woman but Margaret of Anjou, nothing might ever have been heard of the Yorkist title. It is only in the course of bitter political strife that Richard of York begins to put forward his title as heir to Edward III. At first he is only anxious as to what is to happen when Henry dies, as probably he will die without issue, for he has been married five years and has no son. This must open a dis-

putable succession because the Beauforts have claims of a sort derived from John of Gaunt. The queen gave birth to a son, and, though not at once, the claim to be Henry's successor becomes a claim to supplant Henry. When in 1460 the Duke of York laid his pedigree before the lords with a formal demand for the crown, legitimism makes its first appearance in English history. A compromise was patched up for a while—Henry was to remain king, but the Duke was to succeed him. War broke out, the Duke was killed. His son Edward, Earl of March, seized the crown and sceptre and had himself proclaimed king Edward IV. He reckoned his reign from 4 March, 1461, the day on which he proclaimed himself king. There had been no formal election, no parliamentary recognition: he reigned by hereditary right. A parliament recognized the justice of the claim. The three Henrys became pretended kings, kings *de facto* but not *de jure*.

So far as I can understand it, the confusing struggle which we call the Wars of the Roses is not to any considerable extent a contest between opposite principles—it is a great faction fight in which the whole nation takes sides. Still the House of Lancaster was in a measure identified with a tradition of parliamentary government, had been placed on the throne to supplant a king who had a plan of absolute monarchy, had been obliged to rely on parliament and more especially on the commons, perhaps owed its fall to its having allowed both lords and commons to do what they pleased, to get on without government. On the other hand, the claim of the House of York was bound up with a claim to rule in defiance of statutes. It might be urged that the statutes were void as having never received the assent of any rightful king, but an assertion that the laws under which a nation has been living for the last half-century are not laws, because you or your ancestors did not assent to them, is practically an assertion that you have a right to rule in defiance of any laws however made.

It is fortunate for us that Edward IV did not leave a son old enough to step into his father's shoes, and that no sooner had the crown been acquired by the legitimist family than the

succession was again disturbed by the crimes of Richard III. Henry VII had according to our ideas little that even by courtesy could be called hereditary right. Probably he would not have got the crown had he not undertaken to marry Elizabeth, the daughter of Edward IV. Still an hereditary right he did assert, and Stubbs has argued that according to the notions of the time the assertion was not absurd¹. He was accounted to have reigned from the day of Bosworth; before his marriage parliament declared that the inheritance of the crown should rest and remain in the then sovereign lord, king Henry VII, and the heirs of his body; he refused to be king merely in right of his wife.

The king's powers we might consider under various heads, but repetition must be avoided. We have already seen that it is for him to summon parliament; parliament cannot meet unless he issues writs. Again he could prorogue parliament, suspend its sessions and dissolve parliament. We have seen too that the constitution of a parliament depended in no small degree upon his will; it was for him to create peers—but the hereditary principle was here a check on his power; the bishops were practically his nominees; he had assumed the power of granting to boroughs the right to send representatives; disputes over contested elections came before him and his council. His assent was absolutely necessary to every statute; besides this, he had a somewhat indeterminate power of making ordinances and dispensing with statutes. Certain things he certainly could not do; he could not repeal a statute, he could not impose a tax, it had become unlawful for him to meddle with the ordinary course of justice. He was bound by law—true the principle still held good, it holds good at the present day, that 'the king can do no wrong'—law had no coercive process against the king, he could not be sued or prosecuted; the only way of getting justice out of him was by a petition, an appeal to his conscience. But means had already been found to reconcile this royal immunity with ministerial responsibility—if he could not be sued or prosecuted his servants could be, and his command would shield no one who had broken the law. What is more,

¹ *Lectures on Medieval and Modern History*, pp. 342-5.

as we shall see, a procedure by way of impeachment had been evolved whereby parliament could bring home their responsibility to his ministers.

But then again, the executive or administrative or governmental power was the king's. You will be familiar with such terms as these, they pass current in modern political life and of course they have a meaning. When we have marked off the work of legislation, the imposing of general laws upon the community, and also the work of judicature, the hearing and determining criminal charges and civil actions, there yet remains a large sphere of action, which we indicate by such terms as these. *Governmental* seems to me the best of these terms; *executive* and *administrative* suggest that the work in question consists merely in executing or administering the law, in putting the laws in force. But in truth a great deal remains to be done beyond putting the laws in force—no nation can be governed entirely by general rules. We can see this very plainly in our own day—but it is quite as true of the Middle Ages:—there must be rulers or officers who have discretionary powers, discretionary coercive powers, power to do or leave undone, power to command that this or that be done or left undone. The law marks out their spheres of action, the law (as we think) gives them their powers. I do not wish you to think that a definite theory to the effect that while legislative power resides in king and parliament, the so-called executive power is in the king alone, was a guiding theory of medieval politics. On the contrary, the line between what the king could do without a parliament, and what he could only do with the aid of parliament, was only drawn very gradually, and it fluctuated from time to time. On the one hand we find that the king has a certain, or perhaps we should say uncertain, power of making general ordinances which shall have the force of law. On the other hand even at an early time parliaments interfere with what a political theorist would consider to be purely executive or governmental work: for instance they are sometimes strong enough to dictate to the king who shall be his councillors—as we should say, they appoint the ministry. Such a power as that our modern parliaments do not openly exercise, but it was exercised in

II *Variations in the Meaning of Kingship* 197

the Middle Ages. Again we find a parliament ordaining that the taxes shall be paid to two particular persons and be expended by them on the war. The production and audit of the royal accounts is also insisted on: this we cannot call legislative business. In short, the more we study our constitution whether in the present or the past, the less do we find it conform to any such plan as a philosopher might invent in his study.

Still parliament, even when the king is weak, leaves him a large field of action and expects him to be busy in it. A do-nothing king, or a king who is merely a moderator between contending parties, or a king who merely executes the expressed desires of parliament, is not the ideal king of the Middle Ages. He is the ruler of the nation, the commander of its armies and its fleets, the national treasure is his treasure, and in very general terms does parliament interfere with his expenditure; it is for him to keep the peace, the peace is his peace; all public officers, high and low, with but few exceptions are appointed by him, dismissible by him; they hold their offices during his good pleasure—this is true of the high officers of state, the chancellor and treasurer, it is true of the justices of the king's courts, it is true of the sheriffs, it is expected of him that he will supervise the work of his servants, that he will call them to account, that he will dismiss them when they offend.

It is somewhat unsatisfactory work, this attempt to speak in general terms of a long and eventful period like the two centuries which divide the accession of Edward II from that of Henry VIII. Changes in the letter of the law are, it may be, few and gradual, but the real meaning of the kingship varies from decade to decade. The character of the king, the wants of the time, these decide not merely what he will do but what he can do: this we must learn by tracing history step by step,—by seeing that the kingship is practically a different thing in almost every reign; it changes as we pass from Edward III to Richard II, again as we pass from Richard II to Henry IV, and so on. To watch this process in the detail of practice we have here no time, rather let us speak of theory, and theory we shall find is more permanent than practice. Richard II, there can be little doubt, not only determined

to act as though he were an absolute monarch, but had a theory of absolute monarchy. He made 'a resolute attempt not to evade but to destroy the limitations' which had been imposed upon his predecessors, and he had a theory which justified him in the attempt; such limitations were vain, idle efforts to limit a limitless prerogative¹. When he falls it is not merely his practice but his theory that is condemned—not merely has he been guilty of many illegalities, but he has held himself above law: he has said that the laws are in his own breast, that the lives, lands and goods of the subjects are the king's—in short, *quod principi placuit legis habet vigorem*. He is deposed, and it is as representatives of a different theory—that of a king below the law—that the House of Lancaster is to reign. The king, as Bracton had said more than a century ago, has above him the law which makes him king. This principle is stated repeatedly and very clearly by the greatest English writer on law of the fifteenth century. Sir John Fortescue was made chief justice of the King's Bench in 1422 and he served the House of Lancaster in good and evil fortune until all was lost. He did not die until after 1476. His most famous work, *De Laudibus Legum Angliae*, was written about 1469. In this and in other treatises he keeps repeating that the king of England is no absolute monarch. The state of France gives him an opportunity of explaining by way of contrast what he means. The king of France is an absolute monarch—in France that saying of the civil law holds good, *quod principi placuit legis habet vigorem*. But it is not so in England. 'Ther bith ij kindes of kingdomes of the wich that on is a lordship callid in laten *dominium regale* and that other is callid *dominium politicum et regale*. And thai diversen in that the first kynge may rule his peple bi suche lawes as he makyth himself, and therefor he may sette uppon them tayles and other imposicions, such as he woe hymself, without their assent. The secounde king may not rule his peple bi other lawes than such as thai assenten unto. And therefore he may sett upon them non imposicions without thair own assent².'

¹ Stubbs, *Constitutional History*, vol. II, § 268.

² Fortescue, *Governance of England*, ed. Plummer, p. 109; cf. also *De Laudibus*, cc. 34—7.

The kingdom of England is of this second kind. This doctrine Fortescue maintained even after the hopes of the Lancastrian party were at an end and he himself had made his peace with Edward IV—and I believe we may say that it was the generally accepted doctrine of the time. Edward, however arbitrary might be his acts, asserted no theoretic claim to be above the law. The same may be said of Henry VII. The danger during the whole Tudor period is not that the king will assert such a principle but that practically he will be able to get exactly what he wants by means of submissive and subservient parliaments. It is the fashion now to speak of Edward IV as beginning 'the New Monarchy,' and there is point enough in this title—but the legal limits of royal power erected in earlier centuries remain where they were. In the changed circumstances the king is beginning to find out that parliamentary institutions can be made the engines of his will.

We turn from the king to the king's council, the early history of which we have already traced¹. The king had at his side a body of sworn councillors. During the fourteenth century this body becomes definitely distinct from parliament on the one hand, and from the Courts of Law on the other. The composition of the council depends as a general rule on the king's will, though occasionally parliament has interfered with it. We have the list of the council as it was in 1404 under Henry IV; it contains three bishops, nine peers, seven commoners, in all nineteen persons. They can be dismissed by the king whenever he pleases; they are sworn to advise the king according to the best of their cunning and discretion. They receive salaries of large amount. They meet constantly; the king is not usually present at their deliberations. The proceedings of the council are committed to writing; this begins at least as early as 1386—the proceedings from that year until 1460 have been printed by the Record Commissioners. The function of the council, we may say, is to advise the king upon every exercise of the royal power. Every sort of ordinance, licence, pardon that the king can issue is brought before the council. Sometimes parliament

¹ See p. 91, and Dicey's *Privy Council*.

trusts it with extraordinary powers of legislation and taxation, allows it to suspend or dispense with statutes, to raise loans, and the like. It is to the advice of the council that the king looks in all his financial difficulties, which are many.

But though the royal council has thus become a permanent part of the machinery of government, and a most important part, still it is, we may say, an unstable institution—that is, its real power is constantly changing from time to time. Under a strong king it is really no check upon his will; he can appoint it and he can dismiss it; he is not obliged to take its advice, he is not even obliged to ask its advice. This Henry VII has discovered; he does not bring the weightiest matters before the council, or does not do so until he has made up his own mind: the council then has to register foregone conclusions. But under weak kings it has been otherwise, and under infant kings the council has ruled England. It will be no digression therefore if we say a little of royal minorities.

Since the Norman Conquest there have been three cases. Henry III was nine years old when he began to reign; Richard II eleven years; Henry VI was but nine months. We have further to remember that during a considerable part of his reign Henry VI was perfectly imbecile. When Henry III succeeded to the throne there was no member of the royal house capable of urging any claim to be regent. This is an important fact, for it gave rise to an important precedent. The barons, in whose power the young king was, appointed William Marshall, Earl of Pembroke, *rector regis et regni*, and associated certain councillors with him. We have already seen how it is to this time that we can definitely trace the existence of a *concilium Regis* that is distinct from the *curia Regis*. Within three years the regent died. No one was appointed to fill his place, but the government was carried on by the council, at the head of which stood Hubert de Burgh, the chief justiciar. Our public law had made great advances before the next case arose, the accession of Richard II. On his coronation the assembled magnates appointed no regent, but named a council of government. Before long, troubles set in and the king had to submit to the

restraint of a council appointed by parliament; not until he was three-and-twenty was he able to free himself from this control. When Henry VI succeeded his father we hear of a definite claim to the regency. His uncle, the Duke of Gloucester, claimed the regency both as next of kin and under the will of the late king. But this claim was disallowed by the lords assembled in parliament; after searching for precedents they pronounced that he could not claim the regency on the score of relationship, and that Henry V could not dispose of the government of the kingdom by his will. An act of Parliament constituted the Duke of Bedford protector and defender of the realm and church of England. The assent of the king to this act of parliament must of course have been a mere fiction—he was but a few months old. This precedent sanctioned what has since been regarded as law, namely, that our law makes no provision for any regency, that the king's nearest kinsman has not as such any claim to be regent, that a king cannot by his will declare effectually who is to govern England after his death. If such a case arises parliament must provide for it. Further, the king, no matter how young he is, can give his assent to an act of parliament—this, it is true, may be a fictitious assent, but a king is bound by the acts of parliament done during his minority: obviously this doctrine has difficulties before it, with which however we are not at this moment concerned. 'During the minority of Henry VI the council was a real council of regency and by no means a mere consultative body in attendance on the protector. It defined its own power in the statement that upon it during the king's minority devolved the exercise and execution of all the powers of sovereignty¹.' But then when Henry came of age the council became once more a new instrument in the hands of the king, or of those who, for the time being, could gain an ascendancy over the king. In 1454 Henry became quite imbecile; it was impossible to get a word from him. The lords chose the Duke of York protector and defender of the realm; this resolution was embodied in an act to which the commons gave their

¹ Stubbs, *Constitutional History*, vol. III, § 689.

assent; the king had just sense enough to place the great seal in the hands of the Earl of Salisbury, and in this way the royal assent was given. In the next year the king recovered his senses, but in a few months he again fell ill, and the same ceremony of appointing a protector by act of parliament was enacted.

Under Edward IV and the Tudors the council ceases to be any real restraint upon the king. Its power, it is true, increases, but this merely means an increase of the royal power. It is powerful against all others, but weak against the king. It is but an assembly of the king's servants, whom he appoints and dismisses as pleases him best, whom he consults when it pleases him, and only when it pleases him. Henry VII, says Bacon, in his greatest business imparted himself to none, except it were to Morton and Fox. No law compelled him to ask advice; all the powers which any council could exercise were simply the king's powers, powers which the king himself might exercise if and when he pleased.

A certain limitation to this principle was found in the practice regarding the king's seals. From the Norman days onward the king's will had been signified by writs, charters, letters patent, letters close and so forth, sealed with the royal seal. No document without the king's seal could be regarded as an authentic expression of the king's command. The king's Great Seal was committed to the Chancellor—he was the head of the whole secretarial establishment, (as we now might say) the Secretary of State for all departments. When in the middle of the thirteenth century the chief justiciars came to an end, the chancellorship grew in dignity and in power. During the later Middle Ages and far on through the Tudor time the chancellor is the king's first minister—prime minister. The possession of the royal seal makes his office of the first importance. Gradually we begin to hear of other seals besides the great seal. The chancellor has so much miscellaneous work to perform as a judge and otherwise, so much routine business requires the great seal, that for matters directly affecting the king a privy seal is in use. The king under his privy seal gives directions to the chancellor as to the use of the great seal. Then this privy seal is committed

to the keeping of an officer, the Keeper of the Privy Seal. In course of time a yet more private secretary intervenes between the king and these high officers of state, namely, the king's clerk or king's secretary, as he comes to be called, who keeps the king's signet. In the Tudor time we find two king's secretaries, who before the end of that time are known as secretaries of state. A regular routine establishes itself—documents signed by the king's own hand, the royal sign manual, and countersigned by the secretary are sent to the keeper of the privy seal, as instructions for documents to be issued under the privy seal, and these again serve as instructions for the chancellor to issue documents bearing the great seal of the realm. This practice begets a certain ministerial responsibility for the king's acts. The law courts will not recognize any document as expressing the royal will unless it bears the great seal or at least the privy seal. This insures that some minister will have committed himself to that expression of the royal will. The ministers themselves are much concerned in the maintenance of this routine; they fear being called in question for the king's acts and having no proof that they are the king's acts. The chancellor fears to affix the great seal unless he has some document under the privy seal that he can produce as his warrant; the keeper of the privy seal is anxious to have the king's own handwriting attested by the king's secretary. For the king again this is a useful arrangement; it is the duty of these officers to remember the king's interests, to know how the king's affairs stand; as the king's affairs grow more manifold, division of labour becomes necessary; there must be an officer at the head of every department bound to see that the king is not cheated or prejudiced, and the danger of his interests being neglected is decreased, if in the ordinary course of business his letters have to pass through several different hands. Thus, even when there is on the throne a strong-willed king with a policy of his own, ministers are necessary to him. At present we may say this is a matter of convenience, but in this doctrine of the royal seals we can see the foundation for our modern doctrine of ministerial responsibility—that for every exercise of the royal power some minister is answerable.

C. Administration of Justice.

Hitherto we have said nothing of what in general estimation constitutes the most important side of the council's history, the history of its judicial powers; but to this we shall best come by first taking a short review of the administration of justice as a whole.

More and more the king's courts have become the only courts of the first importance. Of the feudal and the ancient communal courts we need say but very little; by one means and another business has been drawn away from them. That an action for freehold land should be begun in the court baron of the lord of whom the land is holden is a principle unrepealed—it remains indeed unrepealed until 1833¹; but many ways of evading it have been devised by the ingenuity of lawyers, and it has in truth become a dead letter. We may indeed doubt whether in Henry VII's reign there are many courts baron which have more than a nominal existence.

Even the customary court of the manor has suffered a heavy blow. It was, you will remember, the court for those who, whether personally villeins or no, held their land by villein tenure. In Henry VII's day personal villeinage, owing to causes which we cannot here discuss, has practically become extinct. But further, and this is of great importance, the king's courts have at length decided to protect the tenant in villeinage in his holding. He is now getting a new name, derived from those copies of the court rolls which serve as evidence of his title; he is a tenant by copy of court roll, in shorter phrase a copyholder. At length the king's courts have decided that he shall no longer be left with merely such protection in his holding as the manorial courts afford—if the lord contrary to the custom of the manor turns him out, he shall have an action against his lord, an action of trespass in the king's courts. In 1457 we get a hint that this is so; in 1467, and again in 1481, it is definitely said that the copyholder can bring an action against his lord if ejected contrary to the manorial custom. The manorial custom thus becomes a recognized part of the law of the land, to be enforced in

¹ 3 and 4 Will. IV, c. 27.

the king's court. This of course was a serious blow to the manorial courts—contentious business was taken from them—anyone who claimed copyhold land instead of going to them would go to the king's courts, where he would get a more certain justice. A great deal of business remained, and still in theory remains, for the customary court to do. The copyholder when he wishes to convey his land must surrender it into the hands of the lord, who then admits a new tenant; such surrenders and admittances took place in court—in theory they took place in court until very lately—but all this business became more and more a matter of routine now that the king's courts had fully recognized the rights of the copyhold tenant. If the customary dues were paid the lord had no choice but to accept the surrender and admit the new tenant, and these surrenders and admittances were in fact accomplished in what only by fiction and figure of speech could be called a court—practically there was but a transaction between the tenant and the lord's steward. However, our present point is that before the end of Henry VII's day, owing rather to the ingenious devices of lawyers in search of business than to any legislation, the manorial courts had ceased to be of any great importance as tribunals for contentious business.

As regards what I have called the communal courts, we have seen that before the end of Edward I's reign a rule had been established which made them courts for small cases: they were not to entertain cases in which more than 40 shillings was at stake¹. In Henry VII's time the county court was still held month by month, and the sum of 40 shillings had not yet become a trivial sum; but long before this the freeholders of the shire had been allowed to discharge their duty of appearing at the monthly court by sending their attorneys instead of coming in person, and it is very probable that the judicial business was practically transacted by the sheriff without much interference on the part of the freeholders or their representatives. Trial by jury has not, we see, made its way into the procedure of these courts; they still make use of the ancient system of compurgation.

¹ See p. 132.

But we have now to notice a new institution which has grown up since the days of Edward I, an institution which is to play a very large part both in the administration of justice and in local government, namely, the justices of the peace. In the thirteenth century we hear occasionally of knights of the shire being assigned, that is, appointed, to keep the peace—sometimes they seem to be elected by the county court. Their duty seems to be that of assisting, perhaps also of checking, the sheriff in his work of preserving the peace, arresting malefactors, and the like. Then immediately after the accession of Edward III a statute is passed (1327, 1 Edw. III, stat. 2, c. 16) to the effect that in every shire good and lawful men shall be assigned to keep the peace. In 1330 (4 Edw. III, c. 2) it is repeated that good and lawful men shall be assigned in every county to keep the peace; those who are indicted before them are to be imprisoned, and they are to send the indictments to the justices of gaol delivery. These *custodes pacis*, conservators of the peace, have therefore already power to receive indictments, the accusations preferred by juries, but they do not as yet try the indicted; they commit them to prison to take their trial before the king's judges on their circuits. In 1360 another step is taken. A statute (34 Edw. III, c. 1) repeats that in every county there shall be assigned for the keeping of the peace one lord and, with him, three or four of the most worthy of the county, with some learned in the law, and they are to have power to arrest malefactors, to receive indictments against them, and to hear and determine at the king's suit all manner of felonies and trespasses done in their county according to the law and customs of the realm. The conservators of the peace are now authorised not merely to receive indictments, but to try the indicted. Very soon after this, having been trusted with these high judicial powers, they come to be known as justices; they are no longer mere conservators of the peace, they are justices of the peace. In 1388 it is directed by statute that they are to hold their sessions four times a year—this is the origin of those Quarter Sessions of justices of the peace which are still held in our own day. Now this new institution soon becomes very popular

with parliament and flourishes; parliament constantly adds to the powers of these justices; they are in truth men drawn from the same class of country gentlemen which supplies parliament with knights of the shire. For a long time there are persistent demands that the justices shall be elected by the freeholders; this demand finds expression in many petitions presented by parliament to Edward III. But on this point the king will not give way, he will keep the appointment of justices in the hands of himself and his council. It is so common now-a-days to regard our constitutional history as one long triumph of the elective principle, that it is well to notice that at two points this principle was persistently urged and finally defeated. Our ancestors wanted elected sheriffs, and they wanted elected justices of the peace; to this day our sheriffs and our justices are appointed by the king, and I do not suppose that one would wish them elected. The justices of the fourteenth century were paid wages—four shillings for each day of session; they were entitled to these wages until very lately; here again the great change in the value of money which took place in the sixteenth century has had important effects on our constitutional law. In Richard II's day a form of commission was settled which, in all the most material respects, is that still in use. The king assigns certain persons by name to be his justices in a particular county; he empowers every one of them to keep the peace and to arrest malefactors, and he empowers every two of them to hold sessions for the trial of indicted persons.

Now at the period with which we are dealing these are the main duties of the justices of the peace:—(1) they are to keep the peace by putting down riots, arresting offenders and so forth, and (2) in their quarter sessions they are to try indicted persons—the trial is a formal trial by jury. Their power extends over pretty well all indictable offences except treason only, but the more difficult cases they are directed to reserve for the king's judges on their circuits. These are their main duties, but parliament has been gradually adding many other duties of a very miscellaneous character. In particular, parliament has long been engaged on elaborate legislation about the rate of wages. We have to remember

the Black Death of 1349, one of the greatest economic catastrophes in all history; the guess has been made that it destroyed not much less than half the population. It utterly unsettled the medieval system of agriculture and industry: wages of course rose enormously; parliament endeavoured by statute after statute to keep them down, to fix a legal rate of wages. This attempt produced many of the grievances which burst into flame in the revolt of 1381, 'one of the most portentous phenomena to be found in the whole of our history. But still parliament did not abandon the effort: to gain its end it endowed the justices of the peace, representatives of the landowning class, with very large powers of compelling men to work for the legal wage. After a while, in 1427, it even delegated to these justices the power of fixing the legal rate: the justices of the peace were the justices of labourers also—in our language they have not merely judicial powers, they have governmental powers also. And this matter of wages, though it is the most important, is by no means the only specimen of governmental duties cast upon the justices of the peace. More and more the quarter sessions of the peace begin to supplant the old county court as the real governing assembly of the shire; the old county court sinks into a mere tribunal for small civil suits. In 1494 we find that the justices have even got a control over the sheriff: by 11 Hen. VII, c. 15, they are empowered to entertain complaints against the sheriff as to extortions practised by him in the county court, and to convict him and his officers in a summary fashion. This power to convict persons in a summary fashion, that is to say, without trial by jury, is, we observe, being given to justices in a number of cases. The practice begins in the fifteenth century and becomes very usual in the sixteenth: parliament is discovering that for petty offences trial by jury is a much too elaborate procedure. An instance or two may be given:—

In 1433 (11 Hen. VI, c. 8) the justices are empowered to punish in a summary way those who use false weights or measures; in 1464 we have an elaborate statute (4 Edw. IV, c. 1) about the making of cloth, regulating matters between master and man; upon complaint made of any offence against

this ordinance, the justices of the peace may send for the party and examine him, and if the party by examination or other due proof be found guilty he is to be fined; in 1477 (17 Edw. IV, c. 4) we have a similar statute about the making of tiles; in 1503 the justices are to punish those who take young herons from their nests—they are to call the suspected person before them and by their discretion examine him. The statutes, of which these are specimens, seldom lay down any rules of procedure, only it is made clear that there need not be trial by jury, and that the suspected persons may be questioned.

We see here then a yet young but very strong and healthy institution, one which has a great future before it. Country gentlemen commissioned by the king are to keep the peace of the shire, are to constitute a court of quarter sessions with high criminal jurisdiction, are to punish the pettier offences in a summary way, are to exercise miscellaneous governmental powers and police powers—to fix the legal rate of wages for example. They are to be substantial men. In 1439 a statute (18 Hen. VI, c. 11) says that they are to have lands or tenements to the value of £20 a year. At present their number is small, some six or eight for the shire: during the Tudor time it increases. The Tudor kings find here a useful institution for the purposes of their strong policy—for from the first a stern check has been kept upon these justices; not only have the courts of law been ready, perhaps eager, to notice any transgression by the justices of their statutory powers (for the old courts will not suffer any rivalry, and will put the narrowest construction upon any statute which authorizes any departure from the procedure of the common law), but also these justices are specially under the eye of the royal council. A statute of 1388 (12 Ric. II, c. 10), when giving them certain new powers of dealing with labourers, threatens them with punishment at the discretion of the king's council if they do not hold their sessions. We shall have much more to say of justices of the peace hereafter.

The three old courts—the three superior courts of common law, King's Bench, Common Pleas and Exchequer—have grown in power and dignity. The number of the judges is

small, though it has not yet become fixed at the sacred twelve—and they are now erudite lawyers, men who have made their fame by practising at the bar. The line of demarcation between the provinces of these three courts is not so plain as once it was, for by the use of ingenious fictions the King's Bench has been stealing business from the Common Pleas, and the Exchequer is beginning to follow its example. But to one or the other of these three courts goes almost all of the civil litigation of the realm—all that the local courts are incompetent to entertain. The King's Bench is the supreme court for criminal cases, and the Exchequer still keeps its monopoly of all cases touching the royal revenue. These courts have by this time become purely judicial institutions, they have little or nothing to do with governmental work; it is their function to hear and determine causes according to the law of the land, and they are very conservative of all the formalities of their procedure. Already the Year Books contain vast masses of decided cases, and these cases are treated as binding authorities.

Then again the ambulatory or visitatorial courts have been maintained. Twice a year or so the counties are visited by justices, whose commissions enable them to deliver the gaols and to hear and determine all the criminal business, or all such part of it as is not disposed of by the justices of the peace at their quarter sessions—whose commissions enable them also to take the trial of civil cases which are depending in the king's courts at Westminster. A great deal of this work is done by the judges of the three common law courts—indeed, by statute, much of it must now be done by them—though other persons, landowners of the county, are associated with them in the commissions. The work of these itinerant justices has now become purely judicial work—to preside at trials, to hear and decide causes; they no longer, like their predecessors of the twelfth century, add to this duty that of looking after the royal revenue and conserving the king's interests. What is more, we no longer find that the whole county is summoned to meet them, with all its hundreds, boroughs and townships represented. A single grand jury now represents the county: the older plan had been found very burdensome,

and seems to have been abandoned late in the fourteenth century

A great change has been coming over trial by jury since we last looked at it, and trial by jury has become of great importance in national history. The change has been a slow one, and it is hardly yet completed. Turning first to civil cases we may formulate the change thus:—the twelve jurors are ceasing to be witnesses and are becoming judges of fact; it is no longer the theory that before they come into court they will know the truth about the matters at issue, but when they come into court the parties put evidence before them, produce witnesses who testify in the judge's hearing. We see that this is so from a book already mentioned: Sir John Fortescue, *De Laudibus Legum Angliae*. He describes how 'each of the parties by themselves or their counsel in presence of the court, shall declare and lay open to the jury all and singular the matters and evidences whereby they think they may be able to inform the court concerning the point in question, after which each of the parties has a liberty to produce before the court all such witnesses as they please¹'—in short, trial by jury is taking that form in which we now-a-days know it, the jurors try questions of fact. Still, in Fortescue's book the change is not yet perfect, he sometimes speaks of the jurors as though they were witnesses—they are drawn from the district in which the events took place, in order that they may bring their own knowledge to bear upon the question; if they give a false verdict they are liable to be attainted, the case can be tried over again by twenty-four jurors, and if the new verdict contradicts the old, the first jury of twelve is very severely punished. In civil cases this mode of trial has become almost universal, though there are still certain cases respecting property in land in which trial by battle can be claimed, and there are some other cases in which recourse is still had to compurgation.

The commonest procedure in civil cases involves the use of two juries, an indicting and a trying jury, or, as we say, a grand and a petty jury. The grand jury is a body of twenty-three persons representing the county, sworn to present criminals. In the past the theory has been that such a jury

¹ c. xxvi.

accuses men of its own knowledge, and, even in our own day, this form is preserved—an indictment even in our own day states that the jurors say upon their oaths that A, of malice aforethought did slay and murder B. As a matter of fact, however, what happens now is this—and we may perhaps carry back the change as far as Henry VII's day—some person who believes that A has committed a crime goes before the grand jury and profers a bill of indictment, a document stating that A has murdered B. The grand jurors hear the evidence for the prosecution, and if they think that this makes it probable that A is guilty, then without hearing any evidence for the defence they write on the bill 'a true bill,' and then A has to take his trial before a petty jury; if, however, they think that there is no ground for suspicion, they write 'no true bill'—the old phrase was 'Ignoramus'—we know nought of this—the bill is said to be ignored, and A goes free, though he is liable to be indicted another time for the same offence:—he has had no trial, and is not acquitted. A majority of the body of twenty-three grand jurors decides whether the bill shall be ignored or no. So much as to the grand jury.

In the present day, a person who has been indicted must, as a matter of course, stand his trial before a petty jury; he is tried, as we all know, by a jury of twelve, and the jurors are judges of fact—their verdict is based on the evidence of witnesses given before them in court. But in Henry VII's day this was not quite the case—an indicted person was not tried by jury unless he consented to be so tried, but this consent was extorted from him by torture, by the *peine forte et dure*. If, when asked 'how will you be tried?' he refused to say 'By God and my country,' if (as the phrase went) he stood mute of malice, he was pressed under heavy weights until he either died or said the necessary words. So late as 1658 a man was pressed to death, so late as 1726 a man was pressed into pleading, not until 1772 was the *peine forte et dure* abolished. This horrible process was a reminder that trial by jury was not native to English law—there had been a time when to convict a man of crime without allowing him to appeal to God by means of battle or ordeal, had seemed an impossible injustice. The reason why men were found hardy

enough to submit to the terrible torture of being pressed to death, instead of escaping with a mere hanging, was this, that if they were convicted they forfeited lands and chattels, if they died unconvicted there was no forfeiture, and thus their families were not ruined.

Another point that we may note is that before Henry VII's day the law had come to demand unanimity of the jurors—unless the twelve agreed there could be no verdict. This rule, as we all know, prevails at the present day; but it only became fixed in the course of the later Middle Ages; it certainly looked at one time as if the law would be content with the verdict of a majority.

We have already seen that procedure by indictment had once been a novelty in English law—a novelty introduced by Henry II: it had taken its place beside the older procedure of an appeal by the party wronged¹. In Henry VII's day this older alternative still existed, and was still in use—the appellee could either claim trial by battle, or submit to trial by jury. Trial by battle was, however, becoming very unusual. Appeals were not, however, abolished until 1819: their abolition was due to the fact that in 1818, in the celebrated case of *Ashford v. Thornton*, an appeal was brought, and the appellee claimed trial by battle—the appellor refused to fight.

It is necessary, in order to explain what follows, to understand that before the end of the Middle Ages trial by jury had taken a deep root in the English system, and had already become the theme of national boastings. Fortescue contrasts it favourably with the procedure of the French courts, where there was no jury, and where torture was freely employed. It is a very curious point in European history, that an institution which was once characteristically Frankish, became, in course of time, peculiarly English, and underwent, without losing its identity, the great change which turned the body of neighbour-witnesses into judges of the evidence given by other witnesses.

But to return to the courts—we have yet to speak of the judicial functions of the parliament, of the king in parliament. In this sense 'the king in parliament' comes to mean the House

of Lords. In the fourteenth century, as we have already seen, we must regard the presence in parliament of representatives of the commons as something new. These newcomers gradually improve their position, they will not be mere granters of taxes, they claim to share in deliberation and in legislation. But now we have to note that they never obtain, hardly attempt to obtain, any share in the judicial work which from of old had been done by the king in the assembly of prelates and barons. The jurisdiction of the king in parliament remains the jurisdiction of the king with his prelates and barons; in other words, since the king does not himself take part in judicial proceedings (in the fourteenth century, to say the least, it is most unusual for him to do so, in the fifteenth century, as we learn from Fortescue, it is thought distinctly improper that he should do so), the jurisdiction of the king in parliament has come to mean the jurisdiction of the House of Lords. This we find is of three kinds.

(i) The House of Lords acts as a court for the trial of peers accused of treason or of felony. Of this we have said something already¹. If the parliament be not sitting, the peer is tried by the Lord High Steward, assisted by a body of peers chosen by him. Very probably it is because this work of trying peers was one very principal field for the jurisdiction of parliament, that the commons took no part in the judicial work. At any rate, in 1399 the commons, fearing perhaps that they might be called in question touching some of the very irregular proceedings of Richard's reign, protested solemnly that they had no part in judicial work—the judgment of parliament was the judgment of the king and the lords; this protest established a permanent principle.

(ii) We have what is called the jurisdiction in error, the jurisdiction of the king and parliament as a court of error, a court which could correct the errors in law of all lower courts. This we may trace back far—the last resource for royal justice was the king surrounded by the magnates of the realm. We find it settled in the fifteenth century as a jurisdiction to correct errors in matters of law, as contrasted with matters of fact. The notion of trying the same *facts* twice over, except by attainting the jury, is quite foreign to our

¹ See pp. 169—171.

medieval law—but if the king's courts of common law make errors in law, it remains for the House of Lords to correct those errors. During the fourteenth century this jurisdiction seems to have been freely used, but for some reason or another, not very easy to understand, it went out of use in the fifteenth century. Between Henry V and James I there are hardly any known cases of error being brought before the lords: however, this procedure, though for a time disused, had a great future before it, as we shall see hereafter.

(iii) The parliament, that is to say, the lords, had gradually abandoned all attempt to act as a court of first instance in criminal or civil cases, save when a peer was to be tried for felony or treason—but to this there was one great exception. They had entertained accusations both against peers and against commoners when preferred by the commons. Such accusations preferred by the commons to the lords came to be known as impeachments. The first case of what can definitely be called an impeachment, occurs in the Good Parliament of 1376; Lord Latimer, the king's chamberlain, and one Lyons, were impeached. In 1386 we have the impeachment of the Duke of Suffolk; some other cases follow rapidly during the troubled reign of Richard II. A few more cases followed, just sufficient to establish the outlines of a procedure—the last is in 1459. After this there is a long break from 1459 until this ancient weapon was furbished for a new use in 1621; during the interval parliaments were hardly in a position to impeach the king's ministers, for it was as a check upon the king's ministers that the impeachment was chiefly valuable, and came to be afterwards valued; smaller offenders could be left to their fate in the ordinary courts.

One other parliamentary process remains to be noticed—but it must be carefully distinguished from an impeachment—I mean an act of attainder or of pains and penalties. A statute, we say, can do anything—such acts as I have just mentioned are statutes, acts of parliament for putting a man to death, or otherwise punishing him without any trial at all. It is not a judicial act, it proceeds with the legislative authority of king, lords and commons. At the Coventry parliament of 1459 the Yorkist lords were attainted. Two years afterwards

the turn for the Lancastrians comes, and Henry VI, his wife, and a large number of his supporters are attainted. In 1477 the Duke of Clarence was attainted—these were miserable precedents, acts of anarchy and of revenge. It was under Henry VIII, who could obtain anything from parliament, that the act of attainder came into common use: of this hereafter. But distinguish such an act, a statute passed by king, lords and commons, without any trial, without any judicial formalities, from the trial before the House of Lords of a person who has been impeached, i.e., formally accused by the commons.

We have yet to speak of the jurisdiction of the king's council, a matter with which it is difficult to deal, because it was constantly the subject of bitter controversy. We have seen that in Edward I's time the council exercised a jurisdiction, which it is somewhat difficult to mark off from that of the parliament; the two work together so harmoniously that the council at times seems a standing committee of the parliament, or the parliament a particularly full and solemn meeting of the council. But this harmony is soon dispelled: throughout the fourteenth century there is constant conflict between the council and the parliament, and the latter seeks time after time to set limits to the judicial functions of the former. We may distinguish three different kinds of jurisdiction, (1) the power to correct the errors of the ordinary courts of law, (2) an original jurisdiction, jurisdiction as a court of first instance in criminal cases, (3) an original jurisdiction in civil cases.

(1) The first of these has the shortest history. The function of correcting the errors in law of the ordinary courts of law became definitely the function of the parliament (i.e., as we have seen, of the House of Lords), and the council had to forego it. In 1365 we have a case in which the judges of the Court of Common Pleas refused to pay any heed to the reversal by the council of a judgment of the justices of assize—the council, they said, is not a place in which judgments can be reversed¹. Again in 1402 we have a statute (4 Hen. IV, c. 23) which shows that the council had been calling in question the judgments of the lower courts, had

¹ *Yearbooks*, vol. III, 39 Edw. III, f. 14.

not been regarding them as final—it is therefore ordained that after judgment the parties shall be in peace, until the judgment be reversed by attaint or by error. However, without interfering with judgments already delivered, the council had a wide field of action, and it is over its jurisdiction as a court of first instance that controversy rages.

(2) Already in 1331 parliament attempts to put a stop to legal proceedings, other than those in the ordinary courts of law. It is enacted (5 Edw. III, c. 9) that no man is to be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods or chattels seized into the king's hands, against the form of the Great Charter and the law of the land. In 1351 we have a second statute (25 Edw. III, stat. 5, c. 4): 'None shall be taken by petition or suggestion made to our lord the king, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighbourhood, where such deeds be done in due manner or by process made by writ original at the common law; and none shall be put out of his franchise or his freehold, unless he be duly brought in to answer, and forejudged of the same by the course of the law.' Then again in 1354 (28 Edw. III, c. 3), 'no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought in answer by due process of law.' In 1363 and 1364 we have other statutes (37 Edw. III, c. 18; 38 Edw. III, c. 9) which denounce punishment against persons who make false suggestions to the king, statutes which seem to be aimed at the jurisdiction of the council. Then again in 1368 (42 Edw. III, c. 3) we have the old story—it is established that 'no man be put to answer without presentment before justices, or matter of record, or by due process and writ original according to the old law of the land.' But all these statutes which seem devised to curb the council, and to sanction the procedure of the common law courts, indictments and original writs, as the only legal procedure, have apparently but little immediate effect. Under Henry IV and Henry V the commons are still petitioning against the jurisdiction of the council; but the king does not assent to their petitions. They then become

silent ; and it would seem that under the constitutional rule of the Lancastrian house, the jurisdiction of the council was not oppressively exercised. The series of statutes at which we have glanced remained unrepealed, if disregarded, during the whole of the Tudor period. They became of vast importance under the Stuarts, for they were the base for the contention that the Court of Star Chamber was no legal tribunal.

Still the convenience of a tribunal which was not bound down to a formal procedure (and we must remember that the procedure of the common law courts was extremely formal) made itself apparent from time to time, and we find parliament admitting that the council has a certain sphere of jurisdiction. This we may see in several different quarters. In 1351 parliament began its course of anti-Roman legislation ; we have those statutes of Provisors and of Praemunire, which play a large part in the history of our church, statutes directed to excluding the interference of the Pope with English benefices. In 1363 (38 Edw. III, stat. 2, c. 2) we find parliament ordaining that persons who offend against these statutes are to answer for it before the council, and to be punished according to the discretion of the council. Lords and commons are in great earnest about this matter, and are therefore quite content that justice shall be done rapidly and without any dilatory formalities. In 1388 parliament is so very desirous that justices shall hold their quarter sessions for the enforcement of the statutes of labourers, that it (12 Ric. II, c. 10) enacts that if justices do not hold sessions they are to be punished according to the discretion of the king's council. In 1453 we find a temporary but very severe act (31 Hen. VI, c. 2), passed after Jack Cade's insurrection, which fully admits the lawfulness of writs directing persons guilty of riots, oppressions and extortions, to appear before the council. Contempt of such writs is to be severely punished by forfeiture ; this is to endure for seven years. A more general admission we find in certain articles for the council of the infant king agreed to by parliament in 1430—all petitions to the council dealing with matters determinable by the common law are to be sent to the common law courts, unless

the discretion of the council feel too great might on the one side, too great unmight on the other, or else other reasonable cause that shall move them¹.

If we place ourselves at the accession of Henry VII, and ask ourselves whether the criminal jurisdiction of the council was legal, we shall find it hard to come by a very definite answer. On the one hand there were statutes unrepealed which might be read as condemning it entirely. Our law knows not now, and knew not then, any such principle as that statutes can grow obsolete—a statute once enacted remains in force until it is repealed. Still it is a hard thing to pronounce illegal that which parliament and the great mass of the nation, including probably the judges, regard as legal; and it seems probable that at Henry's accession this was true of the council's jurisdiction. It was generally admitted that it could punish those offences which the courts of common law were incompetent to punish, offences falling short of felony (the council seems always to have shrunk from pronouncing the penalty of death) in particular, offences which consisted in an interference with the ordinary course of justice, riots, bribery of jurors, and so forth. It was, I think, felt that there were men who were too big for any court but the council: they would bribe jurors and even judges. The statutes to which we have referred were, we may say, protests in favour of trial by jury—but there are other statutes which show very plainly that trial by jury often meant the grossest injustice: there were men whom no jury would convict. This, I think, was admitted, and the remedy was seen in a reserve of extraordinary justice to be found as of old in the king and his immediate advisers, justice which could strike quickly and not have to strike again, justice which could strike even the most powerful offenders.

It is with this in our minds that we approach the statute of 1487 (3 Hen. VII, c. 1), which has been regarded as creating the Court of Star Chamber. It recites that certain offences are very common, riots, perjury, bribery of jurors, misconduct of sheriffs and some others of the same class; then it empowers

¹ Nicolas, *Proceedings and Ordinances of the Privy Council* IV, 61, § 111.

the chancellor, treasurer, and keeper of the privy seal, calling to them a bishop and a temporal lord of the council, and the two chief justices or other two justices in their absence, to call before them persons accused of these offences to examine them, and to punish them according to their demerits as they ought to be punished, if they were thereof convict in due order of law. The statute says nothing of the Star Chamber; but for a long time past a room in the palace of Westminster bearing that name had been commonly used by the council for its judicial sessions. It names, we observe, certain particular offences—and it names certain persons who are to hear the charges and punish the offenders. Now, in later times (of this we shall have to speak again) we find a tribunal which is known as the Court of Star Chamber; it is not exactly constituted on the lines marked out by the statute of Henry VII, and it does not confine itself to the offences mentioned in that statute. It consists apparently of the whole council, or of a committee of the council, and must have generally comprised all or most of the officers mentioned in the statute: chancellor, treasurer, keeper of the privy seal, two judges, one temporal lord of the council and one bishop; and though it does punish the offences mentioned in the statute, still 'it punishes many other offences as well—in short, it exercises a very comprehensive penal jurisdiction, practically an unlimited jurisdiction, or limited only by this, that it does not attempt to inflict the penalty of death. Under the Stuarts we have bitter controversy as to the legality of this court: if on the one hand it is regarded as created by the Act of 1487, then it habitually exceeds the powers which were entrusted to it by parliament: if on the other hand it be regarded as exercising a jurisdiction inherent in the king's council, then it may well be argued that it acts in direct defiance of those unrepealed statutes of Edward III's reign, of which we have already spoken¹.

To this point we must come back hereafter; let us now notice that Henry VII and his successors have ready to their hands a most efficient engine of government. The same body

¹ Reference may now be made to Leadam, *Select Cases in the Star Chamber* (Selden Society) 1902.

which issues ordinances, which controls the execution of the law and the administration of the state, acts also as a court of justice with a comprehensive penal jurisdiction—one day it can make an ordinance, and the next punish men for not obeying it. Its jurisdiction it exercises without any lengthy formalities—there is no trial by jury before it—the accused person is examined on his oath, a procedure quite strange to the courts of common law, in which (as the phrase goes) no-one can be compelled to accuse himself. And it uses torture. Fortescue, the Lancastrian chief justice, to whose writings we have more than once referred, speaks of torture as foreign to English law—this is one of the respects in which he extols the English law at the expense of continental law¹. But in Edward IV's reign torture begins to make its appearance; we hear of it in 1468. It never becomes part of the procedure of the ordinary courts, but a free use is made of it by council, and the rack becomes one of our political institutions. The judicial iniquities of Edward IV's reign are evil precedents for his successors.

(3) We have been speaking in the main of the penal or criminal jurisdiction of the council. But it had exercised a civil jurisdiction as well, and this has a history of its own. If in one direction we see the power of the council represented by the Court of Star Chamber, in another we see it represented by the Court of Chancery.

We must go back a little way. Ever since the Norman Conquest every king has his chancellor, who has the custody of his great seal, and is at the head of the whole secretarial body of king's clerks. When at the end of Henry III's reign there ceases any longer to be a chief justiciar, the chancellor becomes the king's first minister. Robert Burnell, the chancellor, is Edward I's chief adviser. The chancellor is almost always an ecclesiastic—there are a few instances of lay chancellors in the fourteenth century—generally he is a bishop. In many different ways he has for a long time past been concerned in the administration of law. In the first place it has been his duty, or that of his clerks, to draw up those royal writs (original writs) whereby actions are begun in the king's courts

¹ *De Laudibus Legum Angliae* c. xxi.

of common law. He has also had some judicial powers of his own—in particular, if it be asserted that the king has made a grant of what does not belong to him, it is for the chancellor to hear the matter, and if need be to advise the king to revoke his grant. Then again he has always been a member of the king's council, and what is more, the specially learned member—that he should be acquainted with canon law and Roman law, as well as with the common law of England, was very desirable. Naturally then if questions of law came before the council, the chancellor's opinion would be taken.

As the fourteenth century goes on we find that a good deal of civil litigation comes before the council in one way and another. Persons who think themselves injured and who think that, for some reason or another, they cannot get their rights by the ordinary means, are in the habit of petitioning the king, asking for some extraordinary relief. We must remember that besides the ordinary writs whereby actions at law were begun, writs which were obtained from the Chancery as a matter of course upon payment of the fixed fee, there was a certain power reserved to the Chancery of making new writs to suit new cases, of introducing modifications in the established forms. Sometimes the relief which a petitioner desired was of this kind; at other times he wanted more than this—he wanted that the council should send for his adversary and examine him upon oath. Various excuses for the king's interference are put forward—the suppliant is poor, old, sick; his adversary is rich and powerful, will bribe or intimidate the jurors, or has by accident or trick obtained some advantage of which he cannot be deprived by the ordinary courts. The tone of these petitions is very humble, they ask relief for the love of God and that peerless Princess his Mother, or for His sake who died on the Rood Tree on Good Friday. A common formula is—for the love of God and in the way of charity. Thus the petitioner admits that strictly speaking he is not entitled to what he asks—he asks a boon, a royal favour¹.

¹ *Select Cases in Chancery* (A.D. 1364—1471), ed. for the Selden Society by W. P. Baildon, 1896.

II *The Chancellor's Equitable Jurisdiction* 223

Now the series of statutes and petitions of parliament, to which we have already referred, seems to have been directed quite as much against the interference of the council in civil litigation as against its assumption of criminal jurisdiction—the view of parliament is that the courts of common law are sufficient. Gradually, in the fifteenth century, the council seems to have abandoned the attempt to interfere with cases in which there was a question which the courts of common law could decide, but it became apparent that there were cases in which no relief at all could be got from these courts, and yet cases in which according to the ideas of the time relief was due. I cannot say very much about this matter without plunging into the history of private law—still something ought to be said. It had for many reasons and in many cases become a common practice for a landowner (A) to convey his estate to some friend (B), upon the understanding that though that friend (B) was to be the legal owner of it, nevertheless (A) was to have all the advantages of ownership:—B was then said to hold the land ‘to the use of A, or upon trust or in confidence for A.’ This dodge, for such we may call it, was employed for a variety of purposes. Thus, for example, A has some reason to believe that he will be convicted of treason—during the Wars of the Roses many persons must have regarded this as highly probable—he desires to prevent his land being forfeited, he desires to provide for his family:—he conveys his land to B upon the understanding that B is to hold it upon trust for, or to the use of, him, A. Then A commits treason,—there is no land to be forfeited—the land is B’s and B has committed no crime—still B is in honour bound to let A’s heir have the use and enjoyment of the land. The same device was used for the purpose of evading the feudal burdens; the same device was used for defrauding creditors—the creditor comes to take A’s land and finds that it is not A’s but B’s. The same device was largely used by the religious houses in order to evade the statutes of mortmain; they were prohibited from acquiring new lands—but there was nothing to prevent a man conveying land to X to be held by him upon trust for the monastery. The credit or blame of having invented these uses, or trusts,

is commonly laid at the door of the religious houses. At any rate, in the early part of the fifteenth century this state of things became very common: B was the legal owner of the land, but he was bound in honour and conscience to let A have the profit of it and to do with it what A might direct. His obligation was as yet one unsanctioned by law—the courts of common law had refused to give A any remedy against B; they would not look behind B; B was the owner of the land and might do what he pleased with it regardless of A's wishes.

By this time (we are speaking of the early part of the fifteenth century) it had become so much the practice for the king's council to refer all petitions relating to civil cases to the chancellor—the king's chief legal adviser—that petitioners who wanted civil relief no longer addressed their complaints to the king, but addressed them to the chancellor, and the chancellor seems to have commonly dealt with them without bringing the matter before the king and council. Now this device of 'uses, trusts or confidences' of which we have just spoken provided the chancellor with a wide and open field of work. In Henry V's reign we find that the chancellor will enforce 'a use' (as it is called)—if B holds land to the use of A, the chancellor on the complaint of A will compel B to fulfil the understanding, will compel him to deal with the land as A directs—will put him in prison for contempt of court if he refuses to obey the decree:—though B is legally the owner of the land, it is considered unconscionable, inequitable, that he should disregard the trust that has been put in him—the chancellor steps in, in the name of equity and good conscience. No doubt this was convenient; if the chancellor had not given help, in course of time the common law courts would probably have had to modify their doctrines and to find some means of enforcing these 'uses.' But the common law was a cumbrous machine, and could not easily adapt itself to meet the new wants of new times. On the other hand the chancellor had a free hand, and it is by no means impossible that for a long time past the ecclesiastical courts (and the chancellor was an ecclesiastic) had been struggling to enforce these equitable obligations. At any

rate when once it had become clear that the chancellor was willing and able to enforce them, a great mass of business was brought before him. It was found highly convenient to have land 'in use.' Parliament and the common lawyers do not like this equitable jurisdiction of the chancellor—sometimes they plan to take it away and to provide some substitute—but it justifies its existence by its convenience, and in the reign of Henry VII we must reckon the Court of Chancery as one of the established courts of justice, and it has an equitable jurisdiction; beside the common law there is growing up another mass of rules which is contrasted with the common law and which is known as equity.

The establishment of such a system of rules is an affair of time. Of the equity of the fifteenth century, even of the sixteenth, we know but little, for the proceedings in the chancery were not reported as those of the common law courts had been ever since the days of Edward I. But this fact alone is enough to suggest that the chancellors did not conceive themselves to be very strictly bound by rule, that each chancellor assumed a considerable liberty of deciding causes according to his own notions of right and wrong. Probably, however, the analogies of the common law and the ecclesiastical jurisprudence served as a guide. In course of time (this belongs rather to a subsequent stage of our history but should be mentioned here) the rules of equity became just as strict as the rules of common law—the chancellors held themselves bound to respect the principles to be found in the decisions of their predecessors—a decision was an authority for future decisions.

Thus it came about that until very lately, until 1875, we had alongside of the courts of common law, a court of equity, the Court of Chancery. I shall attempt to describe hereafter the sort of thing that equity was in the present century before the great change which abolished all our old courts and the sort of thing that it is at this moment. We are now dealing with past time and must think of the chancellors as having acquired a field of work which constantly grows. They are supplementing the meagre common law, they are enforcing duties which the common law does not enforce, e.g. they are enforcing

those understandings known as uses or trusts, and they are giving remedies which the common law does not give, thus if a man will not fulfil his contract, all that a court of common law can do is to force him to pay damages for having broken it—but in some cases the Chancery will give the more appropriate remedy of compelling him (on pain of going to prison as a contemner of the court) to specifically perform his contract, to do exactly what he has promised. Then again the procedure of the Court of Chancery differed in many important respects from that of the courts of law; in particular, it examined the defendant on oath, it compelled him to disclose what he knew about the facts alleged against him. Popular the Court of Chancery never was, but the nation could not do without it—and so gradually our law acquired what for centuries was to be one of its leading peculiarities; it consisted of a body of rules known as common law supplemented by a body of rules known as equity, the one administered by the old courts, the other by the new Court of Chancery.

D. *General Characteristics of English Law.*

As time does not permit me to carry out the whole of my plan, I will this morning take notice of a few miscellaneous points which are of some importance¹. And, in the first place, I turn to criminal law in general and the law of treason in particular.

At the head of all crimes stands high treason. In 1352 this crime was defined by a very famous statute. It recites that there had been doubts as to what was treason and proceeds to declare that treason is: if any compass or imagine the death of the king, his wife or their eldest son and heir, or violate the king's wife or his eldest unmarried daughter, or levy war against the king in his realm or be adherent to his enemies in his realm, giving to them aid and comfort in his realm or elsewhere, and if this shall be provably attainted by men of his [the accused person's] own condition. And if a man counterfeit the king's great or privy seal or his money, or bring false money into the realm, or slay the chancellor

¹ For the omitted topics see Analysis, p. xvii.

treasurer, or justices of the one bench or the other, justices 'being in their place doing their offices.' Omitting the rarer cases we may say that there are three main modes of treason: (1) imagining the king's death, i.e. forming an intention to kill the king and displaying this intention by some overt act, (2) levying war against the king, (3) adhering to the king's enemies. From 1352 to the present day this statute has formed the basis of the law of treason. However, in every time of political disorder new treasons have been created, which generally have been abolished when the danger has passed away. Thus in 1397, at the troubled close of Richard II's reign, it was made treason not merely to compass the death of the king, but to compass to depose him. Two years afterwards, when the House of Lancaster had succeeded to the throne, this statute was repealed. So in 1414 it was made treason to kill or rob persons having the king's safe-conduct; but this was repealed in 1442. No other new treason was created by statute during the fifteenth century; but the judges were discovering that the words of the Act of Edward III could be stretched. Then with the Reformation we have new statutory treasons: nine Acts of Henry VIII create new treasons—four directed against the supporters of the pope, five devoted towards maintaining the royal succession as it stood after the king's various marriages:—thus it was made treason to publish and pronounce by express writing or words that the king is an heretic, schismatic, tyrant, infidel or usurper; obstinately to refuse the oath abjuring the papal supremacy; to imagine to deprive the king of his title as supreme head of the church; to assert the validity of the king's marriage with Anne of Cleves. At the beginning of the next reign (1547) all these new treasons were swept away—but some new ones were created—in 1549 it was made treason for twelve or more persons to make a riot with intent to kill, take or kill any of the Privy Council. Then these were abolished in Mary's reign: but some new treasons were created, thus it was treason if any by express words shall pray that God would shorten the queen's life—or to affirm that Philip ought not to have the title of king jointly with the queen. Under Elizabeth, again, there were some new treasons, as for any Jesuit born in

the queen's dominions to remain in the realm. But all along the statute of 1352 remained the normal measure of treason.

It was discovered, however, that its words were elastic enough. We have some extraordinary stories, for the truth of which I cannot vouch, of what under Edward IV was held treason by imagining the king's death. Thus Walter Walker, dwelling at the sign of the Crown, told his little child that if he would be quiet he would make him heir to the Crown—this was treason. Thomas Burdett had a white buck in his park, which in his absence was killed by Edward IV when hunting; Burdett expressed a wish that the buck were, horns and all, in the belly of him who counselled the king to do it—this was treason, though Markham, C. J., refused to be a party to so iniquitous a judgment¹. Whether these stories be true or no, it certainly became established doctrine under the Tudors that an attempt manifested by some overt act to depose the king, or compel him by force to govern in a particular way, is an imagining of the king's death. In the case of Lord Essex, in 1600, the judges declared that in case a subject attempts to put himself into such strength that the king shall not be able to resist him, and to force and compel the king to govern otherwise than according to his own royal authority and direction, it is manifest rebellion, and in every rebellion the law intendeth as a consequence the compassing the death and deprivation of the king, as foreseeing that the rebel will never suffer the king to live or reign who might punish or take revenge of his treason or rebellion. So again the term 'levy war against the king' was extended so as to include riots for political objects; thus Coke holds that it is treason to assemble for the purpose of pulling down not this or that enclosure, but enclosures generally, and in the seventeenth century (1668) a riot for the purpose of pulling down brothels was held to be treason. Thus by the process of interpreting the statute of 1352 what came to be known as 'constructive treasons' were created. For the most part these interpretations remain law at the present day; it has become unusual to put this part of the law in force, riots are generally punished under statutes

¹ Stow's *Chronicle*, p. 430. See also Reeve, *History of English Law*, ed. Finlason, vol. III, p. 32 note.

merely as riots—but still in the main the so-called constructive treasons are still treasons.

One measure of improvement had been passed. A statute of 1552 (5 and 6 Edward VI) required that in cases of treason there should be two witnesses, who are to testify before the accused—our law had no such provision for the case of other crimes and has not at the present day.

Another statute of some importance was passed in 1494 (11 Hen. VII, c. 1): this provides in substance that obedience to a king *de facto* who is not also king *de jure* shall not after a restoration expose his adherents to the punishment of treason. This act carries on its face the stamp of the Wars of the Roses. It became of some importance in after times: it is said that Oliver Cromwell's supporters pressed him to accept the crown in order that they, in case of a restoration, might have that protection which this statute gives to those who obey a *de facto* king—obedience to a lord protector was not within the statute¹.

Next below treason stand the felonies. These consist (1) of the common law felonies, which consist of those crimes which had been considered as peculiarly grave at the time when our common law first took shape in the thirteenth century: homicide, arson, burglary, robbery, rape and larceny. Broadly speaking we may say that they were capital crimes, save petty larceny, stealing to less value than 12*d.* And (2) of certain crimes which have been made felony by statute—and which also are punishable by death. But in the course of the sixteenth century a new line is drawn through the felonies—some are clergyable, others are unclergyable. To go back for a moment to remote times: Henry II had failed in his attempt to bring the clergy under the ordinary criminal law of the realm. The clerk found guilty of crime could only be handed over to the bishop, who would do no more than degrade him from his orders. Owing perhaps to the excessive severity of the law, the doctrine got established that anyone who could read was a clerk: and thus any man who could read could commit felony with impunity

¹ Reference may also be made to Hallam, *Constitutional History*, vol. III, c. xv, and to Stephen's *History of Criminal Law*, vol. II, c. 23.

—women had no such immunity. As the Reformation approaches, statutes begin to interfere with this state of things. In 1496 a statute (12 Hen. VII, c. 7) deprived all but ordained clerks of benefit of clergy, in case of wilful murder. Other statutes follow which take away clergy from all men in particular cases—thus in 1536 certain piratical offences, in 1547 highway robbery, horse-stealing, stealing from churches, in 1576 rape—and so forth, and thus felonies are divided into two classes known as clergyable and unclergyable. Then again under an act of 1487 it was provided that a person not really in orders should have his clergy but once, and should be branded in the thumb, so that the fact of his conviction might be apparent. In 1622, just at the end of our period, women for the first time obtained a privilege equivalent to the benefit of clergy.

Below the felonies again stand the misdemeanours—minor crimes not punished with death, but punished in general by fine and imprisonment. Some are misdemeanours by common law; many are the outcome of statute. The term misdemeanour is gradually appropriated to describe these minor crimes. In the older books we find them called trespasses—but, as time goes on, trespass is the term appropriated to civil wrongs, while misdemeanour is appropriated to crimes not amounting to felony. The same act may be both trespass and misdemeanour; thus if A assaults B, this is a trespass against B, he can sue A for it in a civil court and recover damages, but also it is a misdemeanour; A can be indicted for it before a criminal court, and can be punished for it by fine or imprisonment, or both; the same act has civil consequences and penal consequences, it is a cause for civil action and also a punishable offence.

Treason, felonies, and misdemeanours are all indictable offences—every indictable offence falls under one of these three heads. Of criminal procedure we have already said something—the accused person is indicted by a grand jury and tried by a petty jury. The old procedure by way of appeal is fast dying out. In case of misdemeanour, but not of felony or treason, a person might be put upon his trial before a petty jury without any indictment by a grand jury, in case the

king's attorney-general took up the case and filed what is called a criminal information. The origin of the criminal information is still obscure—it was occasionally employed under the Stuarts for the prosecution of political misdemeanours. The king's attorney-general informed the Court of King's Bench that the accused person had committed a crime, and then that person was subjected to trial before a petty jury. This was the procedure used in the famous case of Sir John Eliot, which will come before us hereafter.

An indicted person was not allowed to make his defence by counsel, and only by degrees was he gaining the power of calling witnesses to give evidence in his favour. In criminal cases the theory that the jury were witnesses had not entirely given way before the theory that they were judges of fact—the prisoner seems at all events to have had no power to compel unwilling witnesses to come and testify in his favour.

Then again below these indictable offences there was springing up a class of pettier offences, for which no general name had yet been found, offences which could be punished without trial by jury by justices of the peace. As yet they did not attract the attention of lawyers, and it is only in the eighteenth century that their number becomes considerable. However, from time to time a statute created such an offence—they were all of statutory origin: the justices of the peace themselves were of statutory origin. Thus taking up the statute book of James I, the following cases meet our eye—he who is guilty of tippling in an ale-house is to be fined ten shillings, the offence being proved by the oath of two witnesses before any one or more justice or justices of the peace; then, again, in 1604 we have a severe game law: it is made penal for persons who have not a certain amount of wealth to keep a greyhound or a setter—he who offends can be sent to gaol for three months on the offence being proved by two witnesses before two or more justices of the peace—and so forth. Parliament has undertaken to regulate divers trades and industries in a very elaborate way, and a breach of these regulations is often made an offence for which the offender can be subjected to a small fine or a short term

of imprisonment by justices of the peace without any trial by jury. In short, what we in our day know as offences punishable upon summary conviction, as contrasted with indictable offences, are becoming not uncommon.

The justices of the peace have by this time become very important persons. They are attracting attention, and books are written about their duties, in particular that excellent book, Lambard's *Eirenarcha*. For every shire a number of country gentlemen are appointed justices of the peace by the king. The boroughs are often privileged by their charters to elect their own justices—sometimes the county justices have no jurisdiction over the borough, sometimes the county and borough justices have a concurrent jurisdiction: this depends on the wording of the borough charters. The duties of the justices have by this time become very miscellaneous. In the first place, four times a year they hold sessions of the peace for the county—quarter sessions—and there they exercise a high criminal jurisdiction: they can try almost all offenders: they try with a petty jury those who are indicted by a grand jury. In the second place, out of quarter sessions they exercise those statutory powers of summary trial of small offences of which I have just spoken. In the third place, we find already the germs of another function which has become very important in our own day, namely, the preliminary examination of prisoners accused of indictable offences. We now are accustomed to see a person accused of crime taken before a magistrate, who either commits him to prison until trial, or lets him out on bail until trial, or, holding that there is no case against him, dismisses the charge. The preliminary trial, for such we may call it, before the justice of the peace has grown up slowly—but we can see the germs of it in the sixteenth century. Ever since their institution in Edward III's reign the duty of seeing to the arrest of suspected persons has been passing out of the sheriff's hands into the hands of the justices—it is for the justices to bail the prisoner if by law he be entitled to bail, or to commit him to prison. Then acts of 1554 and 1555 directed the justices to examine the prisoner and his accusers, to put the examination into writing, and send it to the court before which the prisoner was to stand

his trial. However, we must not suppose that this examination was very like that to which we are now accustomed. The object of it is not to hold an impartial inquiry into the guilt or innocence of the prisoner, and to set him free if there is no case against him, but rather to question him and to get up the case against him; the justice of the peace here plays the part rather of a public prosecutor than of a judge. Fourthly, the justices of the peace have acquired a control over the constabulary of the county. Arrests are now generally made not by the hue and cry as in old times, but by constables who are often empowered to make the arrest by warrants issued by the justices. The validity of such warrants is in Coke's day still a matter of some doubt, but in course of time their scope is widened. Often the first step in a prosecution is now an application to a justice for a warrant for the arrest of a suspected person. Fifthly, the justices have acquired powers which we may, I think, call governmental. In particular, the new Poor Law system instituted by the act of 1601 is placed under their control: so is the new highway system. Quarter sessions thus become not merely a criminal court for the county, but also a governmental assembly, a board with governmental and administrative powers. It thus takes the place of the old county court, which has sunk into being a court held by the sheriff or his under-sheriff for the decision of petty civil causes—chiefly cases of small debts. Parliamentary elections are still said to be held, as of old, in the county court; but probably a parliamentary election is the one occasion on which freeholders attend; the small judicial business of the court is transacted by the sheriff or his deputy.

A very noticeable feature in English history is the decline and fall of the sheriff, a decline and fall which goes on continuously for centuries. In the twelfth century he is little less than a provincial viceroy. All the affairs of the county: justice, police, fiscal matters, military matters, are under his control. Gradually he loses power: new institutions grow up around him and overshadow him. As to justice: first the king's itinerant judges, then the justices of the peace deprive him of judicial work: his county court becomes a

court for petty debts: the functions of his tourn are now performed by justices of the peace with statutory power for punishing small offences: he may never be a justice in his own county. The control over the constabulary has slowly slipped from his fingers and is grasped by the justices of the peace. He is even losing his powers as a tax collector; parliament makes other provisions for this matter, and what he has still to do is very subordinate work. Lastly, he is no longer head of the county force, the *posse comitatus*. Under the Tudors the practice begins of appointing a permanent Lord-Lieutenant to command the military force, the militia it is coming to be called, of the shire.

One of the immediate causes of this decline and fall is that the sheriff has become an annual officer. In the fourteenth century the sheriff was well hated as the oppressor of the county: he had taken the county at a rent and tried to make the most out of it. Having failed, as we have before noted, in obtaining elected sheriffs, parliament set itself to obtain annual sheriffs, and ultimately succeeded. This took a series of statutes extending over near a century, from 1354 (28 Edw. III, c. 7) to 1444 (23 Hen. VI, c. 7). No matter what statute may say, the sheriffs remain in office ten and twelve years: however, in the fifteenth century this point is won. This seals the sheriff's fate: an officer who is to be the head of the police and of the military force cannot be an annual officer. He falls lower and lower until at last he has little more to do than to carry out the judgments of courts of justice—to seize the property of debtors, to seize their persons, to keep the county gaol, to hang felons. His office, once so profitable, becomes merely a burdensome, expensive task. The real work is done by an under-sheriff, but the sheriff is responsible for his conduct and must pay for his mistakes. Already in the seventeenth century it is difficult to get sheriffs—men avoid the office if they can; but they can be, and are, compelled to serve. The sheriff, I say, falls lower and lower in real power: his ceremonial dignity he retains—he is the greatest man in the county and should go to dinner before the Lord-Lieutenant.

The Lord-Lieutenant is originally a military officer; but

he becomes also the honorary head of the justices of the peace. From the first, one of the justices has been specially charged to keep the rolls, the records of the justices—he is the *custos rotulorum*. Generally the same person is appointed Lord-Lieutenant and *custos rotulorum*—and it is in the latter character rather than the former that he comes to be regarded as the first among the justices. Under Tudors and Stuarts the justices are kept well in hand by the king's council, and the Lord-Lieutenant is the person with whom the council carries on its correspondence. At least in later days justices of the peace are usually appointed on the recommendation of the Lord-Lieutenant, but he has no rule over them, he is merely the first among equals. The justices we remember are appointed by the king and hold their offices merely during his good pleasure. Still the office is regarded more and more as a permanent office from which a man should not lightly be dismissed.

Our last word shall be as to the constables. A constabulary in our modern sense, a force of men trained, drilled, uniformed, and paid there is not—our modern police force is very modern indeed. But it has become the law that every parish—or more strictly speaking every township—is bound to have its constable. The constable as we have said is originally a military officer—a petty officer in the county force; but then the county force, the *posse comitatus*, is as much concerned with making hue and cry after malefactors as with defensive warfare; this work falls more and more into the constable's hands, and as the militia becomes more military the constable becomes less military, more purely, in our terms, a police officer. In the seventeenth century he is still elected by his neighbours in the old local courts, in those districts in which such courts still exist: elsewhere and perhaps more generally he is appointed by the justices. Every capable inhabitant of the township can be appointed constable, unless there is some special cause for exemption. Remember that all, or almost all, of our old common law offices are compulsory offices—a person appointed cannot refuse them. To this day a man may be made sheriff or mayor of a borough against his will. Generally the person chosen as constable was

allowed to find a respectable substitute—and this he could do for £5 or £10: the office was annual. The constable had no salary, but he was entitled to demand certain fees for some part of his business. His chief business was the apprehension of malefactors, and for this purpose he was armed with certain powers additional to those which the ordinary man has: thus it was sometimes safe for a constable to make an arrest on suspicion, when it would not have been lawful for a private man. It is well to remember that the constable is an officer long known to our common law: a great part of the peculiar powers of the modern policeman are due to this—that he is a constable, and as such has all those powers with which for centuries past a constable has been entrusted by law. Gradually the constables come more and more under the control of the justices of the peace—in particular, it becomes less and less usual for arrests to be made without the warrant of justices, and in executing such warrants the constable has special protection.

Let me remind you in conclusion that there is one book for the vacation in which some profitable things may be found about Elizabethan justices and Elizabethan constables—if you cannot yet enjoy Lambard's *Eirenarcha*, you can at least enjoy Shallow and Silence, Dogberry and Verges.

PERIOD III.

SKETCH OF PUBLIC LAW AT THE DEATH OF JAMES I.

THE next point at which we will take our stand is the death of James I and the quiet accession of Charles I. Let us once more remember that we are neglecting what certainly are the most obvious divisions of our history. The Tudor period is a distinct, well-marked period, and anyone who was writing the history of England would have to mark it as such. But we are not attempting any such task; rather we are purposely choosing unusual points of view in order that we may see familiar facts in new lights—our attempt is to supplement our books of history. And I want very much to bring out the fact that the history of our public law regarded as a whole is very continuous: the very greatest events that occur in it do not constitute what can fairly be termed revolutions. The Tudor monarchy is indeed something very different from the Lancastrian—the latter was a very limited monarchy, the former, if we regard its practical operation, seems almost unlimited. Still the difference, when we look into it, is found not so much in the nature of the institutions which exist as in the spirit in which they work: the same machinery of king, lords, commons, council, law courts, seems to bring out very different results. Again there is no one minute at which the change takes place—it is not like a change in law which must take place at some assignable date. The Tudor kingship differs from the Lancastrian kingship—but what are we to say of the two Yorkist kings? A distinguished modern historian prefers to make what he calls the New Monarchy begin not with Henry VII, but with

Edward IV—we have indeed an intermediate time. So again at the end of the period, before the death of James I, the relation of the parliament to the king is practically very different from what it was under Elizabeth: but the change has not been sudden; gradually for some time past parliaments have been becoming more independent: there has been no great change in the law, but there has been a slow change in the working of the law.

A. *Parliament.*

I. *Constitution of Parliament.*

There have been no very great changes in the constitution of parliament. We look first at the House of Lords. The parliaments of Henry VII had contained two archbishops, nineteen bishops, and twenty-eight abbots, in all forty-nine spiritual peers. After the dissolution of the monasteries in 1540 the abbots disappear, but six new bishoprics are founded, Oxford, Peterborough, Gloucester, Bristol, Chester and Westminster, and their occupants as a matter of course are summoned to the House of Lords though they hold no baronies. The bishopric of Westminster, however, had no long continuance: it was dissolved in 1550, so the number of spiritual peers fell to twenty-six. The number of the temporal peers does not increase rapidly during the Tudor reigns: a new peerage was seldom created, save when an old peerage was extinguished; during the whole period it fluctuates (on account of minorities and so forth) round fifty. Thus after the dissolution of the monasteries, the spiritual peers became a minority. A change comes with James I; he throws about peerages with a lavish hand: eighty-two lay peers sat in his first parliament, ninety-six in his last. Peers are now invariably created by letters patent definitely granting the dignity. The bishops have become distinctly royal nominees. Practically for a long time past the king had usually had his way about the appointment of bishops; his only competitor was the Pope—but the form of election by the cathedral chapters was maintained. In 1531 a statute, one of the first statutes directed against Rome, dealt with this matter: the king gives the

chapter his licence to elect a bishop, but along with this *congé d'élire*, he sends letters recommending a candidate, and if he is not elected within twelve days then the king may appoint a bishop by letters patent. Capitular election is therefore but a solemn formality. In Edward VI's reign even the *congé d'élire* was abolished by statute; the bishops were to be appointed simply by the king's letters patent. The act which did this was of course repealed under Mary, and was not re-enacted by Elizabeth, who re-enacted the statute of her father's reign, which still is law. We observe therefore that over the constitution of the House of Lords the king has great powers: he practically appoints all the spiritual peers; he can make as many new lay peerages as he pleases.

The House of Commons has considerably increased. By an act of 1535 (27 Hen. VIII, c. 26) Wales was brought fully within the system of English public law. Monmouthshire became an English county with two members, and two for the borough of Monmouth. Each of the twelve counties into which Wales was divided sent one member, and eleven Welsh boroughs sent each one member. By another act of 1543 (34 Hen. VIII, c. 13) two members were given to the county, two to the city of Chester; thus this ancient palatinate was incorporated in the general body of the realm; Durham remained unrepresented until after the Restoration. Thus thirty-one members were added. For a short time Calais was represented, but that last relic of the king's French possessions disappeared in Mary's reign. But this was by no means all: the king, we remember, had exercised the power of conferring on boroughs the right to send members. Hitherto this power had not been extensively used for the purpose of packing parliament, and Henry VIII used it but very sparingly: he gave the right to but five boroughs. Under Edward VI the power was lavishly used for political purposes: he thus added forty-eight members, Mary twenty-one, Elizabeth sixty, James twenty-seven. The number of burgesses in the lower house was thus vastly increased, and with it the power of the crown. When a new borough was created, and when a new charter was granted to an old borough, care was generally taken to vest the right of election not in the mass of the burgesses, but

in a small select governing body—a mayor and council—nominated in the first instance by the crown, and afterwards self-elected. Meanwhile the qualification for the county franchise was not altered; it was still, under the act of Henry VI, the forty-shilling franchise, a qualification which, as the value of money fell, was becoming somewhat low and very capricious. The copyholder now often had just as valuable an estate as the freeholder; it was fully protected by the king's courts, and his ancient services had been commuted for money rents, which, as the value of money fell, became less and less burdensome—still he had no vote. Towards the end of our period we begin to see many signs that to be a member of parliament is coming to be an object of desire: contested elections are keenly fought. James I gave the right to be represented by two members to each of the two Universities.

The time has come when we can no longer speak of the clergy as forming for any practical purpose an estate of the realm. We have seen that they had neglected to obey the *praemunientes* clause, but had voted their taxes in their convocations. They still vote their taxes in convocation, but since 1540 the practice has grown up of passing an act of parliament to confirm the vote, as if it might be doubted whether the convocations could bind the clergy. We have to remember that the church can now no longer claim to be independent of the state. The clergy have been compelled to admit the royal supremacy. In 1534 the convocations were compelled to promise that they would make no new ecclesiastical canons without the king's licence and approval, and this principle was confirmed by act of parliament. Even then within the purely ecclesiastical sphere the convocations can do nothing without the royal assent, and the doctrine has grown up that such canons, even though they have the royal assent, are not binding on the laity¹.

2. *Privileges of Parliament.*

We have as yet said nothing of what are known as the privileges of parliament, but this subject can no longer be postponed, for it is becoming of first-rate importance. Under this head—privileges of parliament—it is, or was, usual to mix

¹ See pp. 511—3.

together several distinct matters. Let us notice first two of the usual sub-heads, (*a*) freedom of speech, and (*b*) freedom from arrest.

(*a*) During the Middle Ages the right of each house to debate freely and without interference from the king or from the other house seems to have been admitted and observed. It is common in this context to mention the case of Thomas Haxey; in 1397 a bill was laid before the commons and accepted by them, which contained a bold attack on Richard II and his courtiers. The king took offence, demanded the name of the person who introduced the bill; Haxey's name was given up; the lords declared that anyone who stirred up the commons to make such demands was a traitor; they condemned Haxey to die, but the Archbishop claimed him as a clerk, so he was not executed, and was soon afterwards pardoned: in 1399, shortly after the accession of Henry IV, the judgment was annulled on the petition of the commons as contrary to their liberties. One of the curious points about this case is that Haxey, to all seeming, was not a member of the House of Commons; it is thought that he may have been a clerical proctor attending parliament under the *praemunientes* clause. Such an interference with the freedom of debate seems to stand almost alone in our medieval history; but in 1376 Peter de la Mare, the Speaker, was thrown into prison for his conduct in the Good Parliament, and remained in prison until after the death of Edward III, when Richard released him; again in 1453 the Speaker, Thomas Thorpe, was imprisoned—the cause seems to have been his opposition to the Duke of York; he was however prosecuted on a private pretext and imprisoned. This occurred during a prorogation. When the commons again met they demanded their Speaker—they demanded of the king and lords that they might have their ancient privilege; the lords however refused their petition and determined that Thorpe should remain in prison. Here, though the real cause of arrest may have been conduct in parliament, the arrest was made in a civil action under the judgment of a court of law, and it bears therefore rather on freedom from arrest than on freedom of speech. A much more important precedent occurred under Henry VIII in

1512. Strode, a member of the commons house, was imprisoned by the Stannary Court for having proposed certain bills in parliament to regulate the privilege of the tin miners. A statute was therefore passed declaring void the proceedings against him, and declaring in a general way that any proceedings against any member of the present parliament or of any future parliament for any speaking in parliament should be utterly void and of none effect. This was a statutory recognition of the freedom of debate. In Charles I's day the king's party had to contend that this was no general statute, but had reference only to the particular case of Strode; the judges in the famous case of Sir John Eliot upheld this contention; then in the Long Parliament the commons resolved that Strode's Act was a general act, and the lords concurred in this resolution: but all this still lies in the future. In 1541 for the first time the Speaker at the beginning of the session included freedom of speech as among the ancient and undoubted rights and privileges which the commons claimed of the king, and thenceforward it became the regular practice that the Speaker should demand this privilege. It is during the reign of Elizabeth that this privilege becomes a matter of contention, though the queen cleverly manages that disputes shall be compromised. In 1566 she prohibits the commons from discussing the succession to the crown, but then gives way, revokes the prohibition, and the commons are grateful. In 1571 Strickland, who has introduced some ecclesiastical bills, is called before the council and ordered not to appear again in parliament; the queen again gives way. In 1576 Peter Wentworth makes trenchant speeches about freedom of debate; the commons are against him, and themselves commit him to the Tower. The same fate befalls him in 1588. The commons acquiesce in the queen's command that they shall avoid religious topics. In 1593 she is very positive—members are only to vote 'Aye' or 'No,' and ecclesiastical matters are not to be discussed; one Morice is committed to prison for introducing an ecclesiastical bill. The commons seem during these years very submissive, especially about ecclesiastical matters: they seem to feel that the time is full of dangers, and that the queen understands

religious matters better than they do themselves. With James on the throne circumstances have changed: in 1614, when he dissolves his second parliament, he commits four members to the Tower; in 1621 Sandys is committed, and James tells the commons pretty distinctly that their privileges exist by his sufferance. The result of this is the Protestation of 18 December, 1621: the commons declare that the privileges of parliament are the ancient and undoubted birthright of the subjects of England—that the commons may handle any subject, and enjoy a complete freedom of speech¹. James sends for the journals of the commons, tears out the protest with his own hand, and dissolves parliament. On the whole, we see that when Charles comes to the throne there are plenty of materials for a conflagration.

(b) The topic of freedom from arrest is connected, as we have seen, with that of freedom of speech, but it is wider. Not only do members of parliament claim that they are not to be arrested for words spoken in the house, but they claim a general immunity from the ordinary law. We have here therefore to note that until very lately our law made a free use of imprisonment, not merely in criminal cases, but in civil cases also; a debtor against whom a judgment had been obtained could be imprisoned until he paid the debt—he could be taken in execution; but also a defendant in a civil action could very generally be imprisoned as soon as the action was begun, unless he found bail for his appearance in court. Now the lords from an early time seem to have enjoyed a considerable immunity from arrest except on criminal charges, and the representatives of the commons seem to have claimed a similar liberty during the session of parliament and for a certain time before and after the session reasonably necessary for their coming and going—exemption from arrest upon criminal charges, at least in case of treason, felony or breach of the peace, was not claimed. A statute of 11 Hen. VI, c. 11 (1433) gave some sanction to this privilege—he who assaulted a member attending parliament was to pay double damages. The privilege was invaded in Thorpe's case, and the invasion was sanctioned by the House of Lords: but the judges who were consulted expressed themselves very

¹ Prothero, *Constitutional Statutes and Documents*, p. 313.

positively as to its existence, and further made a declaration which was to be of great importance in the future, to the effect that the courts of law could not measure the privileges of parliament, these being matters which could only be determined by parliament itself. The houses, in particular the House of Commons, by degrees carried the principle further and further. In 1543, in Ferrer's case, they began a practice of sending their sergeant to deliver a member arrested for debt, and Henry VIII admitted the existence of the privilege. In 1575 they delivered one Smalley, a member's servant, arrested for debt. In 1603 they delivered Sir Thomas Shirley, who had been arrested for debt; this produced the passing of an act (1 Jas. I, c. 13), which, while it fully admitted and gave statutory sanction to the existence of the privilege, yet made certain provisions for the benefit of the creditor. In the seventeenth century this privilege grew to huge dimensions; it became almost impossible to get any justice out of a member of parliament, and limits had to be set to what had become an intolerable nuisance.

(c) Connected with these matters is the power (or if we please to call it so, the privilege) of each house to punish persons (whether they be members of it or no) for a contempt. Already in 1548 we find the commons committing John Storie, one of their members, to the Tower, probably for having spoken disrespectfully of Somerset the Protector. From 1581 we have Hall's case. Arthur Hall, member for Grantham, has published a book derogatory to the authority and power of the house; his punishment is severe; by an unanimous vote the commons expelled him, fined him 500 marks, and sent him to the Tower. In 1585 they expelled Dr Parry for having spoken too warmly. But they also took on themselves to punish those who were not members of the house. Not only did they commit to prison those who interfered with their immunity from arrest, but they also punished some who spoke against the house: thus in 1586 one Bland was fined for having used contumelious expressions against the House. But they have not been content with punishing persons who have insulted the house: in 1621 they condemned one Floyd, who had expressed his satisfaction in the success of the Catholic cause in Germany, to pay a fine of £1000 and to

stand in the pillory. The lords resented this assumption of judicial power, and the commons admitted that they were in the wrong—that they had no jurisdiction except when the privileges of their own house were infringed. Floyd however did not profit by this: the lords condemned him to a fine of £5000 and whipping and branding, besides the pillory. The story is disgraceful to both houses. Here again it is evident enough that the constitution is not working peacefully; both the king and the two Houses of Parliament are ready to commit acts of very questionable legality.

3. *Jurisdiction of Parliament.*

This leads us to speak of the judicial functions of parliament—for it is sometimes reckoned among the ‘privileges’ of the House of Lords that the judicial power of parliament belongs to it. Such a use of the word privilege is not very accurate or convenient—but nevertheless should be observed. This matter has already come before us in the past¹; we have seen that the representatives of the commons never gained a share in the judicial work of the parliament—in 1 Hen. IV (1399) they had protested that they were not judges, and shortly before the occurrence of Floyd’s case, after a search for precedents, they had come to the conclusion that they had no power to punish save for a contempt of their house; in Floyd’s case they were reminded of these declarations and for a while attempted to evade them, but in the end gave way. The judicial work of parliament, done by the House of Lords, we have on a former occasion brought under three heads.

(a) As a court for correcting the errors in law of the ordinary law courts, the House of Lords did very little during the greater part of the period that is under our review: hardly a case of error is to be found between Henry IV and Elizabeth. The infrequent sessions of parliament, the fact that the council had assumed a very wide power of judicature, may be the causes of this. About 1580 however this, among other powers of the parliament, was revived; the lords began once more to hear cases of error, and a statute of 1585 distinctly

¹ p. 214 ff.

recognized their power to do so. A little later they began also to hear both civil and criminal cases as a court of first instance. For this they had but few precedents—it is said that they could find but one between 1403 and 1602. They did not, as we shall afterwards see, ultimately succeed in establishing their right to act as a court of first instance, but from about 1621 onwards until the civil war they did so act; and in the year 1625, at which we have placed ourselves, perhaps we ought to say that it is somewhat doubtful whether they may do so or no—here again is an open question raised by the renewed activity of parliament.

(b) That a peer charged with felony or treason ought to be tried by the House of Lords if that house be sitting, and if not then by the Court of the Lord High Steward is now an admitted principle; but such trials have been far from common.

(c) The procedure by way of impeachment has just been revived. It seems true to say that there is no case of an impeachment between that of the Duke of Suffolk in 1449 and that of Sir Giles Mompesson in 1621, which was at once followed by those of Mitchell, Bacon and others: Mompesson and Mitchell were commoners, impeached of fraud, violence and oppression. The impeachment of Bacon for bribery is still more important, for he, of course, was a minister of the king—he was chancellor. In 1624 the Earl of Middlesex, the Lord Treasurer, was impeached for bribery and other misdemeanours. It is evident that parliament has unearthed a weapon of enormous importance. During the Tudor reigns, matters had stood differently; there was no talk of impeaching the ministers of Henry VIII, and when he had made up his mind to destroy an enemy or a too powerful servant he made use of an act of attainder. Cromwell had by the king's command obtained an opinion from the judges to the effect that by an act of attainder a man might lawfully be condemned without a trial, though, they said, this would form a dangerous precedent. Under such an act it was that Cromwell himself perished. An act of attainder, you will remember, is in form not a judicial but a legislative act, a statute made by the king with the consent of lords and commons.

4. *Functions of the Commons in granting money.*

The function of originating money-bills is sometimes reckoned among the privileges of the House of Commons—at any rate it is the function of that house. We have seen it growing in the past—in particular we have noticed the state of things under Henry IV¹. The matter becomes clearer during the period which we are now surveying. To grant subsidies is the function of the commons, but the grant requires the authority of a statute enacted by king, lords and commons. In 1593 the commons resent a message from the lords reminding them of the queen's want of money—the custom is that the offer of subsidies shall proceed from this house. But it is not until just after the end of our period that a definite formula is adopted which expresses the share of the two houses in the work. Under Elizabeth and James the lords and commons are sometimes said to grant the money—more frequently the commons are said to grant with the consent of the lords. In the first parliament of Charles I we get the formula that is still in use. An act is passed which recites that the commons have granted a tax, and then it is enacted by the king, by and with the advice and consent of the lords spiritual and temporal in parliament assembled and by the authority of the same, that the tax be imposed. It is not until after the Restoration that the commons begin to contend that the lords can make no alteration in a money bill, but must simply accept it, or simply reject it.

5. *Right to determine disputed Elections.*

The commons claim a right to determine all questions relating to the election of members of their house. Such questions in the past seem to have been determined by the king in council. Under Mary, however, we find the commons appointing a committee to inquire whether Mr Alexander Nowell, prebendary of Westminster, may be a member of this house; and it is declared next day that as he is a prebendary of Westminster and as such has a voice in convocation, he cannot be a member of this house, and that the queen's writ ought to issue for a new election. In 1586 the commons, in opposition to the queen, definitely insist that

¹ p. 182

it is for them to inquire into the circumstances of a disputed election—and from this time forward they frequently exercise this function and it seems admitted to be properly theirs¹.

6. *Parliamentary Procedure.*

It is during the period with which we are now dealing that the great outlines of parliamentary procedure, as we now know them, are drawn—the practice of reading bills three times, and so forth. Each house may manage its own affairs; there is no legislation as to its procedure, but gradually precedents are formed and respected and a mass of traditional rules is the outcome. In the House of Lords proxies are admitted; from an early time we find the king licensing bishops and barons to be present in parliament by proxy. In the sixteenth century it becomes the rule that the proxy must himself be a member of the house. This privilege of appointing a proxy seems never to have been extended to members of the lower house. Lords also who dissent from the action of the house exercise the right of entering formal protests upon its journals; this practice grows up in the sixteenth century; there is no similar practice among the commons. Each house conducts its business in privacy; the king, however, occasionally visits the House of Lords, and makes speeches there; a throne is set for him there; but his presence is not necessary, and in practice has become a somewhat rare event.

7. *Frequency and Duration of Parliaments.*

We can have little idea as to what a parliamentary constitution has really meant until we have considered how often parliament has met. We remember that under Edward IV and Henry VII parliaments have been becoming far less frequent than they were in the fourteenth and the first half of the fifteenth century. We remember also that there are statutes of Edward III yet unrepealed which seem plainly to mean that a parliament ought to be summoned at least once in every year.

Henry VIII in his thirty-eight years held nine parliaments. One of these, however, endured for nearly seven years—this

¹ The question was again raised in the Bucks. Election case (*Goodwin v. Fortescue* 1604). Gardiner, *History of England*, vol. 1, pp. 167–70.

III *Frequency and Duration of Parliaments* 249

was the great Reformation parliament, which was summoned for 4 Nov. 1529 and was not dissolved until 4 April, 1536; it sat in 1529, 1530, 1531, 1532, 1533, twice in 1534 and once in 1536; a parliament with so long a life was a very new thing. There is only one long interval without a parliament, namely, from 22 Dec. 1515 to 15 April, 1523, an interval of more than seven years.

Edward VI reigned from 28 Jan. 1547 to 6 July, 1553—six and a half years. There were but two parliaments. The first was summoned for 4 Nov. 1547: it sat a second time in Nov. 1548, again in Jan. 1549, again in Nov. 1549, again in Jan. 1552, and it was dissolved 15 April, 1552—having lasted four and a half years. Another parliament was summoned for 1 March, 1553, and was dissolved at the end of the same month.

Mary reigned from 6 July, 1553 to 17 Nov. 1558—a little more than five years, and in those five years five parliaments were held.

Elizabeth reigned from 17 Nov. 1558 to 24 March, 1603—44½ years; ten parliaments were held. There is one long parliament and some long intervals. Parliament I lasted from 23 Jan. 1559 to 8 May, 1559. After an interval of three years and more Parliament II met on 11 Jan. 1563 and endured to 2 Jan. 1567, having lasted four years. After an interval of four years Parliament III met on 2 April, 1571, and lasted until May. Parliament IV lasted from 8 May, 1572 to 17 April, 1583—hard on eleven years. This is the longest parliament we have yet met with. But it held only three sessions—in 1572, 1576, 1581; it was prorogued on 24 April, 1581, and never met again for business, though by repeated prorogations its nominal life was prolonged for another two years. Parliament V was summoned for 23 Nov. 1584 and lasted with two sessions to 14 Sept. 1585. Parliament VI met on 15 Oct. 1586 and was dissolved on 23 March, 1588. Parliament VII met on 12 Nov. 1588 and was dissolved on 29 March, 1589. Then there is an interval of near four years. Parliament VIII met on 19 Feb. 1593 and was dissolved on 10 April, 1593. Another interval of four and a half years occurs. Parliament IX met on 24 Oct. 1597 and was dissolved on 9 Feb. 1598. Again there is an interval of four

years. Parliament X met on 27 Oct. 1601 and was dissolved on 19 Dec. 1601. In March, 1603 the queen died.

James I reigned from 1 March, 1603 to 27 March, 1625—twenty-two years. Four parliaments were held. There is one long parliament of nearly seven years, and two considerable intervals. Parliament I met on 19 March, 1604 and was not dissolved until 9 February, 1611; it held five sessions, 19 March—7 July, 1604, 21 Jan.—27 May, 1606, 18 Nov. 1606—4 July, 1607, 9 February—23 July, 1610 and 16 Oct. 1610—9 February, 1611. After an interval of more than three years Parliament II, 'the addled Parliament,' met on 5 April, 1614 and was dissolved on 7 June of the same year. Six and a half years intervened. Then Parliament III met on 30 Jan. 1621 and was dissolved after two sessions on 8 Feb. 1622. Parliament IV met on 12 February, 1624 and was dissolved by the king's death on 27 March, 1625.

Looking back then we may say that although the statutes of Edward III's reign have not been observed and are very probably regarded as obsolete, parliaments have still been frequently holden. The king has not been able to get on for more than three or four years without calling a parliament. James managed to do without a parliament for near seven years, and he kept the same parliament alive for near seven years: for so long a life there was a precedent in Henry VIII's reign, and one of Elizabeth's parliaments lived eleven years. We find from what happens under Charles I that the nation would be content if a parliament met once in three years, and was never kept in existence for longer than three years. The long parliaments of Henry VIII, Elizabeth and James, no doubt had very important results—not only did they educate the commons to act together, but they familiarized the nation with the notion of parliament as of a permanent entity, in which the sovereignty of the realm might be vested: it is difficult to think of sovereignty being vested in so fleeting an affair as a medieval parliament, which exists for a month or two and disappears.

The principles which at the present day make it indispensably necessary that parliament should sit in every year were not yet in force; there was no standing army to be

legalized, and the king did not by any means always require a grant of money in every year. Each of the kings and queens of our period has tonnage and poundage granted for life; parliament also often grants additional taxes which will carry the king on for several years. The king is now rich as compared with his predecessors—the spoils of the monasteries have enriched him—the feudal sources of revenue are very profitable—wardships, marriages and the like bring in large sums. Under James I there has been much talk of buying up the king's feudal rights: the parties have not been able to come to terms however—the king wanted in exchange an income of £200,000.

B. Relation of the King to Parliament.

If now we look at the relation of the king to the parliament and ask whether parliament has lost or gained in power we have a rather complicated answer to give. On the one hand there is no doubt that the parliaments of the Tudor reigns, more especially those of Henry VIII's reign, were extremely submissive, practically Henry could get them to do what he wanted. I need not instance his matrimonial affairs, or the great religious revolution, the measures whereby he was made head of the church; the best instance is, I think, given by the remission of his debts. In the years between 1522–8 he exacted heavy loans by a regular process not far removed from compulsion; in 1529 parliament wiped out all the debts; he had recourse to the same expedient in 1542, and the parliament of 1543 whitewashed him once more. It is only towards the end of our period that parliament again begins to act as an independent check upon the king, to assert a will of its own; the parliaments of Elizabeth grumble, the parliaments of James I more than once resist him and defeat him. How it came about that the earlier parliaments had been so very tractable, it is hardly for us to inquire, for this question lies beyond the legal domain; the remembrance of past anarchy had to do with it, the religious difficulties had to do with it, foreign affairs had to do with it, the nation desired a time of peace and of strong government. We must,

I think, add that the nation was thoroughly frightened by Henry. But what does demand our notice is that this very tractability of parliaments serves in the end to save and to strengthen the parliamentary constitution; parliament is so tractable that the king is very willing that king in parliament should be recognized as supreme—it strengthens his hands that what he does should be the act of the whole nation. Let us then look at some of the more extraordinary exercises of this sovereign power of king in parliament. We have already referred to the acts which blotted out King Henry's debts—that surely is an extraordinary exercise of power. We have also spoken of acts of attainder—these also are extraordinary; without any pretence of legal trial a statute may be passed condemning a man to death, and no court of law will call its validity in question. But now look at the royal succession. Thrice over during Henry's reign was the succession arranged by act of parliament; the king's marriage with Katherine of Aragon was declared void, and his marriage with Anne Boleyn was declared valid; then the marriage with Anne Boleyn was declared void; then again both Mary the daughter of Katherine, and Elizabeth the daughter of Anne were treated as legitimate and placed in the succession; then in default of the heirs of his body, Henry was to have power to leave the crown by will to anyone he pleased—to anyone, not necessarily a member of the royal house. It is fairly certain that Henry did exercise this power given him by act of parliament, and devised the crown on the failure of the issue of his three children to the heirs of the body of his younger sister Mary, Duchess of Suffolk, postponing to them the descendants of his elder sister Margaret, Queen of Scots. In the first year of Elizabeth it was enacted by parliament that if any person should affirm that the queen could not with the assent of parliament make laws to settle the descent of the crown, he should be deemed a traitor. There can be no doubt that there was a very strong sentiment in favour of strict hereditary descent—that seems the explanation of the undisputed succession of James I. In all probability he succeeded to the throne in defiance of a will duly executed by Henry VIII under the power given to him by act of

parliament ; nothing however seems to have been said of the will, and the house of Suffolk made no claim. James, as it seems to me, had good reason for supposing that he reigned by virtue of strict hereditary right ; he and his successors had at least an excuse for believing that such right could not be overridden by act of parliament. Still, as we have just seen, there were important precedents the other way—parliament had repeatedly and successfully regulated the succession to the throne.

A still better illustration, however, at once of the actual tractability of parliaments and of the theoretic supremacy of king in parliament is afforded by an act of 1539, which has been called the *Lex Regia* of England, and the most extraordinary act in the Statute Book—power was given to the king to make proclamations with the advice of his council, or a majority of his council, to make proclamations which should have the force of statutes ; the punishment for disobedience might be fine or unlimited imprisonment ; it was not to extend to life, limb, or forfeiture. This act was repealed in the first year of Edward VI—you will at once see the importance of its enactment and its repeal ; they seem distinctly to confirm the doctrine that the king is not supreme, king and parliament are supreme ; statute is distinctly above ordinance or proclamation ; statute may give to the king a subordinate legislative power, and what one statute has given another statute may take away.

There is a yet stronger illustration and this, though it is a rather elaborate story, is worth giving, for it is not generally known. The accession of an infant in the person of Edward VI had been foreseen. His father was given power by statute to appoint governors. He appointed his sixteen executors to form a governing council. They, when Henry was dead, elected Somerset to be Lord Protector, and very soon allowed him to take the whole power into his own hands. Now in 1536 Henry had procured the passing of a statute (28 Hen. VIII, c. 17) which was to enable future kings to rescind any acts of parliament that should be passed while they should be under the age of twenty-four. This act however was at once repealed on the accession of Edward VI, by a statute of 1547 (1 Edw. VI,

c. 11), the requisite royal assent being given by the Protector and the governing council. The reason for revoking the act of 1536 was this, that it was drawn in such very wide terms that had Edward attained the age of twenty-four and revoked the statutes made while he was under that age, it might well have been contended that these statutes were not merely null and void for the future, but that they had all along been null and void, so that everything done under them which could not be justified by the common law would have been rendered illegal *ex post facto*. The act of 1547 repealed this act; it gave the king power when he should attain twenty-four to rescind the statutes passed while he was under that age, but declared that such a repeal was not to have retrospective force. On the whole, I know of no acts of parliament which better illustrate our notion of the absolute supremacy of a statute. A statute gives a king power to revoke statutes and even render them void *ab initio*; this cannot prevent another statute being passed during that king's minority (his assent being given by a council of regency which itself is the creature of a statute), which statute may repeal or modify the previous statute that gave a power of revoking statutes. The power of statute-making cannot be curtailed; no parliament can bind the hands of its successors with any legal bonds.

We might multiply illustrations. Probably it was in the domain of religion that the men of the time saw what seemed to them the most conclusive proofs of the sovereignty of king in parliament. Throughout the Middle Ages there was at least one limitation set to temporal sovereignty; it had no power in spiritual matters; the church was an organism distinct from the state. But now statutes have gone to the very root of religion; the orthodox creed is a statutory creed and that creed has been changed more than once. Thus statute has given the most conclusive proof of its power.

Not only however do we find the supremacy of king in parliament admitted in fact, we find it proclaimed in theory. The Tudor kings are well content that this should be so. The following emphatic and remarkable passage occurs in

‘The Commonwealth of England and the manner of government thereof’—a book published in 1589 by Sir Thomas Smith who was Secretary of State to Queen Elizabeth: ‘The most high and absolute power of the realm of England consisteth in the parliament....That which is done by this consent is called firm, stable and *sanctum*, and is taken for law. The parliament abrogateth old laws, maketh new, giveth orders for things past and for things hereafter to be followed, changeth rights and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth forms of succession to the crown, defineth of doubtful rights, whereof is no law already made, appointeth subsidies, tailes, taxes, and impositions, giveth most free pardons and absolutions, restoreth in blood and name as the highest court, condemneth or absolveth them whom the prince will put to that trial. And to be short, all that ever the people of Rome might do either in *centuriatis comitiis* or *tributis*, the same may be done by the parliament of England which representeth and hath the power of the whole realm, both the head and body. For every Englishman is intended to be there present, either in person or by procuration and attorneys, of what preeminence, state, dignity or quality soever he be, from the prince, be he king or queen, to the lowest person of England. And the consent of the parliament is taken to be every man’s consent¹.’ That is a very memorable passage; the following century, we may say, was one long struggle as to where sovereignty should be, should it be in king and parliament or in king alone. There can be little doubt, I think, which party had history on its side, not merely remote history, but the history of the recent Tudor reigns; the absolute supremacy of the statute-making body, of king and parliament, had been both admitted in fact and acknowledged in theory.

Still it must candidly be admitted that the extent of the royal power was in many directions very ill defined. Before speaking of this it is necessary to refer to the council. The Tudor reigns are, we may say, the golden age of the council:

¹ Smith, *De Republica Anglorum*, ed. L. Alston (with a preface by F. W. Maitland), Cambridge, 1906, Bk. II, c. 1.

the council exercises enormous powers of the most various kinds; but it is not an independent body—as against the king it has little power or none at all, and when in the case of Edward VI the king is a boy, then the council raises up above itself a Lord Protector, who acts pretty much as a king *de facto*. In 1553 the council consists of forty members; there are but four bishops and fourteen temporal peers; the rest are commoners, among whom are the two king's secretaries, who before the end of our period have gained the title 'the king's secretaries of state.' The large number of the commoners marks a great change; the government of the realm has slipped out of the hands of the nobles. In 1536 it is matter of complaint that the councillors are of humble birth. The king chooses capable commoners who will serve him well and who will not be independent. Again, the ecclesiastical members of the council have lost their independence; if they represent the church, still it is a church of which the king is head. On the whole, the council seems to be just what the king would wish it to be, and he consults it or not, as pleases him best; many important negotiations Henry does not bring before his council at all. But to the king a council of able servants is a source of strength.

We must now look at the powers wielded by the king with the assistance of his council. We will bring the subject under four heads—(1) legislation, (2) taxation, (3) judicature, (4) administration.

(1) It certainly seems to have been the common opinion that the king had a certain ordaining power. Regard being had to the past it was difficult to deny this; but what were its limits? Henry VIII, we have seen, obtained from parliament a statute giving to his proclamations issued with the consent of the majority of his council the force of statute law¹. But then this act was repealed. Elizabeth, we find, freely issues proclamations: thus anabaptists are banished from the realm, Irishmen are commanded to depart into Ireland, the exportation of corn, money, and various commodities is prohibited. A proclamation in 1580 forbids the erection of houses within three miles of London under pain of imprisonment. The council frequently issued proclama-

¹ See p. 253.

tions to restrain the importation of books, and to regulate their sale—thus a censorship of the press was established. James I followed the example of his predecessor—in particular he issued frequent proclamations to forbid the increase of London. In 1610 the commons protested—‘it is the indubitable right of the people of this kingdom not to be made subject to any punishment that shall extend to their lives, lands, bodies or goods, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in parliament. Nevertheless it is apparent both that proclamations have been of late years much more frequent than heretofore, and that they are extended not only to the liberty, but also to the goods, inheritances and livelihood of men, some of them tending to alter some parts of the law and to make a new; other appointing punishments to be inflicted before lawful trial and conviction,’ and so forth. ‘By reason whereof there is a general fear conceived and spread among your majesty’s people, that proclamations will, by degrees, grow up and increase to the strength and nature of laws¹.’ To all this, and there is more of it, the only answer is that the proclamations shall go no further than is warranted by law.

Before this answer was given the great oracle of the law had been consulted. Coke, then Chief Justice of the Common Pleas, was summoned to the council, and the question was put to him, whether the king by proclamation might prohibit the erection of new buildings in London and the making of starch from wheat. He was pressed to answer in the affirmative. He refused to answer without consulting his brethren. He consulted with three judges, and they answered that the king cannot by his prerogative create any offence which was not one before, but the king may by proclamation admonish all his subjects that they keep the laws and do not offend them upon punishment to be inflicted by the law—neglect of a proclamation aggravates the offence; lastly, if an offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it so. This probably was sound law—that is to say, there was a distinct precedent for it

¹ *Somers’ Tracts*, vol. II, p. 162. The protest is also printed by Hallam, *Constitutional History*, vol. I, pp. 327—8.

coming from the middle of the Tudor period. In Mary's reign the judges had delivered this opinion: 'The king, it is said, may make a proclamation *quoad terrorem populi*, to put them in fear of his displeasure, but not to impose any fine, forfeiture, or imprisonment: for no proclamation can make a new law, but only confirm and ratify an ancient one.' But though James I had the opinion of his judges against him, still he went on issuing proclamations. It is difficult for us to realize the state of things—that of the government constantly doing what the judges consider unlawful. The key is the Court of Star Chamber—the very council which has issued these proclamations enforces them as a legal tribunal, and as yet no one dares resist its judicial power.

(2) But of course it is one thing to say that the king has no general legislative power and another thing to say that there are no matters about which he can make valid ordinances: thus it may be in his power to regulate the importation and exportation of goods. We are thus led to speak of the taxing power. The highroad of direct taxation had long been barred to the king by very distinct statutes; the case of customs duties was almost equally clear. It is said, and I believe with truth, that between the accession of the House of Lancaster and the reign of Mary there is no precedent for any duty imposed by the king. Edward IV had recourse to benevolences, Henry VII and Henry VIII to forced loans—but they did not attempt to impose taxes on merchandise¹. However in 1557 Mary set a duty on cloths exported beyond seas, and afterwards a duty on the importation of French wines. It seems probable that at the beginning of Elizabeth's reign the opinion of the judges was taken by the council as to the legality of these impositions, and that their opinion was not favourable. The queen however did not abandon the impost, and she herself set an impost on sweet wines. James imposed a duty on currants over and above the tax which was set on them by the statute of tonnage and poundage. Bate refused to pay. The Court of Exchequer decided in the king's favour. It is difficult to understand the judgment as an exposition of law; rather, I think, we must say that the

¹ Henry VIII was given power in 1534 (26 Hen. VIII, c. x) during his 'life natural' to repeal or revive acts relating to the importation and exportation of merchandise.

king succeeded in obtaining from the barons of the Exchequer a declaration that there is a large sphere within which there is no law except the king's will. 'The matter in question is material matter of state, and ought to be ruled by the rules of policy; and if so, the king has done well to execute his extraordinary power. All customs, old or new, are effects of commerce with foreign nations; but commerce and affairs with foreigners, war and peace, the admitting of foreign coin, all treaties whatsoever, are made by the absolute power of the king. The king may shut the ports altogether; therefore he may take toll at the ports.' This seems the main thought of the judgment. It seems that the opinion of the two Chief Justices, Popham and Coke, was taken, though the case did not come before them judicially. They would not go nearly so far as the barons of the Exchequer. They said that the king cannot set impositions upon imported goods at his pleasure, but that he may do so for the good of the people—thus if foreign princes set taxes on English goods the king may retaliate. Their doctrine seems to have been that the king may not set impositions merely for the sake of revenue, but that he may do so for other ends, as for the protection of English merchants: obviously this is an unstable doctrine.

The House of Commons in 1610 took up the matter. The lawyers in that house, in particular Hakewill, very learnedly disputed the judgment of the Exchequer, relying on the statutes of the fourteenth century, and on the cessation of any attempts to tax merchandise without parliamentary authority from the reign of Richard II to the reign of Mary. They carried a bill enacting that no imposition should be set without the consent of parliament, but the lords rejected it. The immediate consequence had been that in 1608 the king, having the judgment in Bates's case at his back, issued a book of rates imposing heavy duties upon almost every article of merchandise. The subject was resumed in the short parliament of 1614; the commons passed a unanimous vote denying the king's right of imposition. They refused to grant any subsidy until this grievance should be redressed. James dissolved the parliament¹.

¹ See Prothero, *Statutes and Constitutional Documents* (1559—1625), pp. 340—53.

A more serious step was now necessary if money was to be obtained. The king had recourse to benevolences. Letters were written to the sheriffs directing them to call upon persons of ability for contributions. The unrepealed statute of Richard III against 'exactions called benevolences' stood in the way. Still it was difficult to argue that the king may not accept a perfectly voluntary gift of money. To the end of the reign the impositions are exacted, though the commons from time to time protest against them.

The legal ground that they occupied was certainly strong, but we must not exaggerate its strength. They were obliged to concede the existence of prerogatives which, at least in our eyes, amount to a prerogative of extorting money. For instance, Hakewill in his famous argument over Bates's case admits that the king can debase the coinage, and as a matter of fact the kings have done this over and over again. The king's power over the coinage was certainly very great. Sir Matthew Hale, writing after the Restoration, is still of opinion that the king may debase the coinage. It is legal, though dishonourable. Even Blackstone is not certain that it is illegal¹. This is one instance of the admitted powers of the king, powers whereby he could increase his revenue. Another instance, and one which becomes of importance in James's reign, is afforded by monopolies.

From the Conquest onwards the kings had exercised the right of granting and selling many valuable privileges—to name but one, though an important matter,—it was to charters purchased from the kings that the towns owed their privileges. Not unfrequently such privileges included privileges of trading—the right to hold a fair or a market could be granted by the king. So could the right to take toll for merchandise passing through the town. Such grants were common, and do not seem to have been in the least unpopular; it was the object of every town to obtain as comprehensive a grant as possible. Under the Tudors the practice of granting rights of exclusive trading assumed enormous proportions: letters patent giving the patentee the exclusive right of selling became common, and some very necessary articles such as salt, leather,

¹ Hale, *Pleas of the Crown*, vol. 1, p. 194. Blackstone, *Commentaries*, vol. 1, c. 7.

and coal had been made the subject of monopolies. In 1597 the commons begin to protest; these monopolies have become a grievous burden. In 1601 a bolder attack is made, and Elizabeth was induced to promise that the existing patents should be repealed and no more issued. The commons however do not seem to have been prepared to assert that all monopolies were illegal, or to separate those which were illegal from those which were not. James, disregarding Elizabeth's promise, made a copious use of monopolies for the purpose of obtaining a revenue. The commons grew bolder, asserted the illegality of all monopolies, and in the last parliament of the reign a declaratory act was passed—an act declaring not merely that grants of monopoly were to be illegal in the future, but also that they had been illegal in the past¹. This is the greatest victory of the commons during the reign of James. An exception was made in favour of letters patent granting the exclusive right of using for a term of fourteen years any new manufacture to the first and true inventor thereof. Our modern patent law is the outcome of this exception.

(3) It is by means of the judicial power of the Court of Star Chamber that the king enforces his proclamations. We have already said something of this court². Let us remember that a statute of 1487 (3 Hen. VII, c. 1) gave authority to certain persons to punish certain crimes. These persons are the chancellor and treasurer of England and the keeper of the privy seal, or two of them, calling to them a bishop and a temporal lord of the king's council and the two chief justices, or in their absence two other justices. The offences that they are to punish are riots, unlawful assemblies, bribery of jurors, misdoing of sheriffs, and some others which we may describe as interferences with the due course of justice. It is evidently contemplated by the statute that the accused persons will not be tried by jury. The statute does not mention the Star Chamber, but that is a room which the council has long used.

Now a difficulty meets us: long before the end of our period there exists what is known as the Court of Star Chamber. This however does not exactly correspond to the

¹ 21 James I, c. 3. The Act did not apply to monopolies. Gardiner, *History of England*, vol. V, p. 233, vol. VIII, pp. 71—5.

² See pp. 218—21.

court described by the statute of 1487—and that in two respects. (a) All the members of the council seem to have been members of it. James himself, at least upon some occasions, sat there in person and himself passed sentence. As many as twenty-five councillors are sometimes found sitting there. It had a great deal of work to do, and in term time sat three days a week. This brings us to the second point. (b) It did not confine itself to dealing with the crimes specified in the statute of 1487. Its jurisdiction over crime was practically unlimited, or limited only by this—that it did not pass sentence of death. We know it best as dealing with what may be called political crimes—sedition and the like; but it dealt also with commoner offences—robbery, theft, and so forth. It dealt with some misdoings for which the common law had as yet no punishment, in particular with libels.

Now was this the court created by the statute of Henry VII? Under Charles I (for we must anticipate this much) the opinion had gained ground that it *was*, that consequently whatever it did beyond the sphere marked out by that statute was an unlawful usurpation of jurisdiction. When the time for abolishing it had come, it was abolished on this score. But the general opinion seems now to be that the jurisdiction of this Court of Star Chamber was in truth the jurisdiction which the king's council had exercised from a remote time, despite all protests and all statutes made against it. The act of 1487 constituted a committee of the council to deal with certain crimes; this however did not deprive the council itself of any jurisdiction that it had. This committee seems to have been in existence as late as 1529, for a statute of that year (21 Hen. VIII, c. 20) adds to the committee the lord president of the council, an officer recently created; but before the end of Henry VIII's reign this statutory committee seems to disappear, it is merged in the general body of the council.

There can, I think, be no doubt that under Elizabeth and James this court was regarded as perfectly legal—though there may have been doubts as to how it came to be legal, and it is said that Plowden, the great lawyer, asserted that it derived all its lawful authority from the statute of Henry VII. Coke speaks of it with great respect, and does not seem to

share Plowden's doubts: 'It is the most honourable court (our parliament excepted) that is in the Christian world¹.' A statute of 1562 (5 Elizabeth c. 9) enumerates the King's Court of Star Chamber along with the Chancery as one of the known courts of the realm. The Chancery had by this time become a fully recognized court of justice, administering a mass of rules known as equity, and yet the origin of its jurisdiction was as obscure as that of the jurisdiction of the council in the Star Chamber: if there were ancient statutes against the one there were ancient statutes against the other also. There can, I think, be little doubt that the Star Chamber was useful and was felt to be useful. The criminal procedure of the ordinary courts was extremely rude; the Star Chamber examining the accused, and making no use of the jury, probably succeeded in punishing many crimes which would otherwise have gone unpunished. But that it was a tyrannical court, that it became more and more tyrannical, and under Charles I was guilty of great infamies is still more indubitable. It was a court of politicians enforcing a policy, not a court of judges administering the law. It was cruel in its punishments, and often had recourse to torture. It punished jurors for what it considered perverse verdicts; thus it controlled all the justice of the kingdom. The old process of attain, of which we have before spoken, had long gone out of use, but in the Star Chamber the jurors had to fear a terrible tribunal which would resent a verdict against the king.

Other courts of a similar kind closely connected with the council had come into existence in divers parts of England. The Council of the North was erected by Henry VIII after the Catholic revolt of 1536 without any act of parliament². It had a criminal jurisdiction in Yorkshire and the four more northern counties as to riots, conspiracies and acts of violence. It was also given a civil jurisdiction of an equitable kind, but in Elizabeth's reign the judges of the common law courts pronounced this illegal. Their doctrine seems to have been that without act of parliament the king might create a new

¹ *Institutes*, Part IV, cap. 5. See Prothero, *Statutes and Constitutional Documents* (1559—1625), pp. 401—3.

² See Lapsley, 'The Problem of the North' in *American Historical Review*, vol. V, pp. 440—66 (1900).

court to deal with matters known to the common law, but that he could not create a new court of equity. But its criminal jurisdiction the Council of the North maintained, and this it seems to have exercised according to the course of the Star Chamber.

The Court of the Council of Wales seems to have arisen under Edward IV, but its authority was acknowledged and confirmed by a statute of 1542 (34 Hen. VIII, c. 26). It was to have authority in Wales and the Welsh marches¹. Under this latter denomination it seems to have considered that the four counties of Gloucester, Worcester, Hereford, and Salop, were included. We hear of protests against this extension under James I, and according to Coke the twelve judges held that these four counties were not within the scope of the council's power. However, the opinions of the judges were in vain: the question what was meant by the marches of Wales was a difficult question. In considering the position of these courts it is desirable to remember that the old local courts had become very useless as judicial tribunals; they could only entertain personal actions in which no more than forty shillings was claimed, and forty shillings had become a small sum. That concentration of justice in the Westminster courts of which we have so often spoken was producing evil effects—it made litigation about small matters very slow and very costly; in many instances it must have amounted to a denial of justice. So there was room enough for new local courts. Men in general seem to have been very willing that these new local courts should exist, and the opposition of the common lawyers was to a large extent a selfish professional opposition, though it served in course of time to maintain the authority of parliament against stretches of the prerogative.

There was, however, one new court of great importance, whose powers they were inclined rather to magnify than to minimize—this was the Court of High Commission². Time does not permit us to investigate the great religious changes of our period; but, of course, the Reformation has an important

¹ For further information see Miss C. A. S. Skeel, *The Council in the Marches of Wales* (London, 1904).

² For the High Commission Court see Prothero, *Statutes and Constitutional Documents*, Intr.

legal side, it is effected by acts of parliament. The measures of Henry VIII and those of Edward VI placed the church under the headship of the king, he was recognized as head of the church. These measures were repealed by Mary. Most, but not all of them, were revived by the Act of Supremacy (1 Eliz. 1); she did not revive the act which asserted the king's headship of the church¹. The ecclesiastical courts continued to exercise their jurisdiction, but above them was raised a court of royal commissioners. The Act of Supremacy empowers the queen to appoint any number of persons, being natural born subjects, to exercise under Her Majesty all manner of jurisdiction in anywise touching ecclesiastical matters. The words of the act (sec. 18) are extremely large, and the commissions issued under it became wider and wider. In 1583 the power of the commissioners has become very ample—there were forty-four commissioners, most of them laymen. In many matters affecting religion they had a discretionary power of fine and imprisonment; these powers could be exercised by any three members of the body, one of them being a bishop. Now this court had a distinctly statutory origin; there could be no ground whatever for questioning its legality. But in this instance the common lawyers were on the side of the crown; if they disliked the prerogative when it interfered with the course of the common law, they magnified it when exercised about ecclesiastical matters; they were glad enough to see their old rival, the spiritual jurisdiction, the humbled servant of the temporal power; they held that so absolute was the royal supremacy over all religious affairs, that even the ample words of the Act of Supremacy did not express its full extent; the high commissioners might do things that were not expressly authorized by the statute book. A little later, the lawyers, or at least some of them, turned round. Coke held that the act of Elizabeth did not give the commissioners power to fine or imprison the laity—the sole weapons that it could use were the old ecclesiastical weapons of censure, penance, excommunication. However, this power was *de facto* maintained, and was largely and oppressively

¹ For Elizabeth's title see Maitland, *Defender of the Faith, and so forth*, *English Historical Review*, Jan. 1900.

used under Charles I. To whatever quarter we look we see that he inherited a great number of difficulties in church and state—lawyers and parliaments were beginning to call in question the legality of the institutions whereby the Tudors had governed the country.

Again commissions had been exercised for the trial of offenders by martial law. In tracing their history we have to notice a verbal confusion. From a very early time the king's constable and marshall were the leaders of the king's army. These offices became hereditary and of no very great importance. However, as late as Edward I, it is the fact that Bohun and Bigod are the constable and marshall, which enables them to paralyze the king, by refusing to lead the army to France. The marshall's office is still in existence; the Duke of Norfolk is Earl Marshall of England. The constable's office fell into the royal family on the accession of the House of Lancaster—occasional grants of the office were made; but after Henry VII's time, the office seems only to have been granted for special occasions. Now as leaders of the army the constable and marshall seem to have had jurisdiction over offences committed in the army, especially when the army was in foreign parts, and in the fourteenth century we hear complaints of their attempting to enlarge their jurisdiction. Now as a matter of etymology, *marshall* has nothing whatever to do with *martial*—the marshall is the master of the horse—he is *marescallus*, *mareschalk*, a stable servant—while of course martial has to do with Mars, the god of war. Still, when first we hear of martial law in England, it is spelt indifferently *marshall* and *martial*, and it is quite clear that the two words were confused in the popular mind—the law administered by the constable and marshall was martial law. Towards the end of the Wars of the Roses we find very terrible powers of summary justice granted to the constable. In 1462 Edward IV empowers him to proceed in all cases of treason, 'summarily and plainly, without noise and show of judgment on simple inspection of fact.' A similar patent was granted to Lord Rivers in 1467. They show something very like a contempt for law—the constable is to exercise powers of almost unlimited extent, all statutes, ordinances, acts and restrictions to

the contrary notwithstanding. This illegal tribunal, for such we may well call it, came to an end after the accession of the House of Tudor—the king had no need of it; but an evil precedent had been set. Mary seems to have executed some of those taken in Wyatt's insurrection without regular trial. In 1588, when the Armada was approaching, Elizabeth issued a proclamation declaring that those who bring in traitorous libels or papal bulls against the queen, are to be proceeded against by martial law. In 1595 there had been riots in London; the queen granted a commission for trying and executing the rebels according to the justice of martial law. There seems to be another precedent for such a commission in 1569, after the insurrection of the northern earls, when six hundred persons were, it is said, executed by the Earl of Sussex. James on several occasions issued such commissions: in 1617, 1620, 1624; they empower the commissioners to try men by the law called the law martial—even those who have been guilty of ordinary felonies. There can, I think, be no doubt that, according to the opinion of the lawyers of the time, such commissions were illegal. The government may put down force by force—but when there is no open rebellion, or when the rebellion is suppressed, it has no authority to direct the trial of prisoners, except in the ordinary courts and according to the known law of the land. As to what was this 'law called martial law' we know little, and probably there is little to be known; it meant an improvised justice executed by soldiers.

It may seem to us very strange that there should have been in full play tribunals, the legality of which was very questionable, and other tribunals, the illegality of which could hardly be questioned. Why, we may ask, was not the question raised in some court of common law? The answer seems to lie, at least partly, in the fact that the judges of the courts of common law were very distinctly the king's servants. It is needless to accuse them as a class of any disgraceful subserviency, though some of them were disgracefully subservient—but past history had made their position difficult. The king was the fountain of all justice; they were but his deputies—this was the old theory, and to break with it was impossible. To hold, not that some isolated act of royal authority was

illegal—but that the government of the country was being regularly conducted in illegal ways—this would have been a hard feat for the king's servants and deputies. The position of affairs may be best illustrated by some episodes in the career of one who has left his mark deep in the history of our law.

Edward Coke was born in 1552, and died in 1634. His books, which were soon treated as venerable authorities, consist of the Institutes in four parts—the first the celebrated commentary on Littleton's *Tenures* (1628), the second a commentary on various statutes ranging from Magna Carta to James I, the third an account of the criminal law, the fourth a treatise on the various courts (all published in 1641 and therefore posthumous)—and thirteen volumes of Reports (the first eleven, 1600–1615, the last two posthumous)—and there are some minor works. Certainly he was a very learned man: he knew his Year Books at a time when such knowledge was becoming uncommon—and by giving the results of his learning in English instead of debased French, he made himself for ages an ultimate authority about all matters of medieval common law: we are but slowly beginning to find out that he did not know everything. In 1593 he became Solicitor-General, in 1594 Attorney-General, in 1606 Chief Justice of the Common Pleas. We soon find him in opposition to the king. In 1605 Archbishop Bancroft had complained of the interference of the common law courts with the ecclesiastical tribunals; the former were constantly issuing in the king's name prohibitions forbidding the courts Christian from entertaining cases which, as the common lawyers maintained, belonged to the lay courts. The king was inclined to take the archbishop's side: he sent for the judges, told them that they were his delegates, and that it was for him to decide to which court cases should go. 'Then' (this is Coke's account) 'the king said that he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me that true it was that God had allowed His Majesty excellent science and great endowments of nature; but His Majesty was not learned in the laws of his realm of England and causes which concern the life or inheritance or goods or

fortunes of his subjects; they are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it; and that the law was the golden met-wand and measure to try the causes of the subjects, and which protected His Majesty in safety and peace. With which the king was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said. To which I said that Bracton saith *quod Rex non debet esse sub homine set sub deo et lege*¹. We see these old words of Bracton doing service again and again. The judges seem even to have told the king that no king after the Conquest had ever taken on himself to give judgment: if they said so, they said what was certainly untrue; but we see that it was difficult to assure James I that he was not in fact, what he was according to admitted theory, the highest judge in his realm.

Coke's next exploit is in 1611, when he and his brethren in the Common Pleas held that the Court of High Commission had no power to fine and imprison. The question turned on the meaning of the section in the Act of Supremacy, to which reference has already been made. The Common Pleas held that the Commission which authorized the infliction of fine and imprisonment was not itself authorized by the statute. The judges of that court, and those of the other two courts, were summoned before the council and examined seriatim. Coke refused to give way; but the other judges were not unanimous. The king promised that a less objectionable form of commission should be issued; and a new commission was issued with Coke's name in it—but he refused to sit, as he was not allowed to see the commission.

As regards the impositions of customs dues. The Court of Exchequer held this to be legal, and Coke agreed that it was legal if the imposition was intended for the good of the public, and not merely for the increase of the revenue. As regards the validity of proclamations in general, he and the rest of the judges were bolder; they declared that a proclamation could not create a new offence—but of this we have already spoken.

¹ Coke, *Reports*, xii, 65. Cf. Gardiner, *History of England*, vol. II, pp. 36—9.

In 1613 Coke was made Chief Justice of the King's Bench, seemingly in the hope that in a more exalted position he would prove more pliant. But the hope was vain. In Peacham's case he objected to the judges being asked singly and apart for their opinions as to a matter which was to come before them judicially. At a later day, when he was no longer a judge, he objected to the whole practice of consulting the judges about such matters—but at this time he merely objected to their being consulted one by one: as solicitor and attorney-general he had often himself asked the judges for their opinions. The practice, however evil it may seem in our eyes, was an old, well-established practice, and it was even possible to contend that the judges were bound by their oaths to give the king legal advice whenever he asked for it.

Then in 1615 Coke plunged into a controversy with the Court of Chancery, in which he was decisively worsted. For some time past the Chancery had claimed and exercised a power of ordering a person who had been successful in a court of law, to refrain from putting in force the judgment that he had obtained, on the ground that he had obtained it by fraud or other inequitable means. You will understand that the Chancery did not attempt to prohibit the courts of law from entertaining or deciding causes—it claimed no supervisory jurisdiction over them, such as the Court of King's Bench exercised over the local courts; but it did claim that if a person had obtained a judgment by inequitable means, by fraud or breach of trust, he might be enjoined from putting in force, from obtaining execution. Coke rebelled against this—and seems to have thought that anyone who went to the Chancery in such a case was guilty of the offence created by the Acts of Praemunire, that of going from the king's courts to another tribunal—acts which had been directed against the judicial power of the bishop of Rome. The matter was referred to the king, and he had the pleasure of deciding in favour of the Chancery, and thus maintaining his theory that he was the supreme arbiter when his judges differed. The victory of the Chancery was final and complete—and if we were to have a court of equity at all, it was a necessary victory.

Then in 1616 came the case of the *commendams*—Bishop

Neile of Lincoln had received two benefices from the king to be held *in commendam*, that is to say, together with his bishopric. An action was brought against him by two men, Colt and Glover, who contested the legality of the royal grant, and in the course of the proceedings it was reported to James that the counsel for the plaintiffs disputed the royal right to grant a *commendam*. Coke and his fellows received orders not to proceed with the hearing of an action in which the king's prerogative was questioned; they answered that they were bound by their oaths not to regard such commands. The king sent for them, and they humbled themselves, with the exception of Coke—from whom no more could be got than that if such a command came he would do what an honest and just judge ought to do.

The intractable chief justice was forthwith dismissed. 'It is the common speech (says a contemporary) that four p's have overthrown him—that is pride, prohibitions, praemunire and prerogative¹.' In 1620 he appears in parliament as a leader on the popular side, and from that time until his death in 1634, did not a little to give the great struggle its peculiar character—a struggle of the common law against the king.

On several occasions during that struggle an important part is played by the writ of habeas corpus. We had better therefore see what that writ was, and we shall have to notice that even during the Tudor time there was considerable doubt as to its scope. From a very early time our kings had claimed to supervise all the justice of their realm. If anyone was imprisoned it was in the king's power to inquire the cause of the imprisonment. We ought to carry our thoughts back to a time when England was full of private prisons—the prisons of lords who claimed jurisdiction by royal grant or by prescription. At the suit of an imprisoned subject the king would send his writ to the keeper of the gaol, bidding him have the body of that subject before the king's court, to undergo and receive what that court should award. As happened in many other cases, this prerogative of the king came to be regarded as the right of the subject. During the

¹ Gardiner, *History of England*, vol. III, pp. 25—6.

later Middle Ages a writ of habeas corpus seems to have been granted in the royal chancery almost or quite as a matter of course; there were clerks very willing to increase their business, and there were judges very desirous of amplifying their jurisdiction. When the three courts of common law had become separate, this work of investigating the cause of an imprisonment belonged most properly to the King's Bench; but by means of fictions the other two courts followed its example, and issued and adjudicated upon writs of habeas corpus.

We ought further to know some little as to the imprisonment of persons accused, but not yet convicted of crime. Our early law seldom kept a man in prison before trial if he could find pledges, if he could find persons who would undertake for his production in court. According to Glanvill it is only in cases of homicide that it is usual to keep a man in prison instead of allowing him to find pledges. The law during the next century grew somewhat stricter. The Statute of Westminster I (1275, c. 12) defined the cases in which pledges are not to be allowed—persons taken for the death of a man, or by commandment of the king or of his justices, or for forest offences, or for certain other causes, are not to be replevied. This statute determined what offences are replevisable and what not until 1826, though a considerable mass of interpretation grew up around it, and certain particular offences were from time to time specially dealt with by statute. In 1275 the work of bailing or replevying prisoners was still done by the sheriff; gradually his powers in this respect were transferred to the justices of the peace. A person who felt himself aggrieved by the refusal of the sheriff or the justices of the peace to let him find pledges could by means of the writ of habeas corpus bring his case before one of the common law courts. These courts had also exercised a power of bailing prisoners whom the sheriff or the justices of the peace could not set free: for instance, the sheriff and justices of the peace could not set a man at liberty if he was accused of treason or of murder—they were distinctly forbidden to do so by the Statute of Westminster—but the King's Bench did not consider that the Statute limited *its* power of allowing bail,

and it exercised a discretionary power of bailing even accused traitors and murderers.

We ought to notice, even though we cannot afford to explore the matter to the bottom, that there was a somewhat subtle distinction between replevying a prisoner and bailing a prisoner: both processes had much the same practical result—but the distinction gave ground for the contention that the power of bailing exercised by the King's Bench was not limited by the Statute of Westminster, which merely forbade sheriffs and others to replevy persons in certain particular cases. Now this small point became of great importance: one of the cases in which a man was not to be replevied was that of a person imprisoned by the commandment of the king: could then the courts of common law bail a prisoner who was imprisoned by the king's commandment? In the reign of Charles I, when the power of the council to commit to prison was the subject of hot controversy, it was asserted by the king's advocates, denied by the parliamentarians, that the power of the King's Bench was restricted by the Statute of Westminster. The argument of the king's opponents took this form—the court's power of bailing prisoners cannot be touched by the Statute of Westminster, for in that case it would never be able to bail an accused murderer: but indubitably it does bail accused murderers—therefore this statute refers merely to the action of sheriffs and similar officers. But further, and this matter concerns us more directly, a number of cases were produced in which the Court of King's Bench had bailed prisoners, when the cause of their commitment was stated to be the king's command. In answer to the writ of habeas corpus, the gaoler had returned that the prisoner was committed by the command of the king, or by the command of the king's council, and yet the court had liberated him upon bail. There was one clear case of this from 1344—the lieutenant of the Tower had returned that one J. B. was in prison by the king's command under his great seal: the court let him out on bail *quia videtur curiae breve praedictum sufficientem non esse causam praedicti J. B. in prisiona retinendi*. The other cases come from the reigns of the Tudors and James I—in all there were

eleven of them—the prisoners were liberated on bail, though the gaoler returned that they were imprisoned (in some cases) by command of the king, or (in others) by command of the king's council¹.

It seems that in Elizabeth's reign, in 1591 or thereabouts, the judges were consulted by the council as to the power of the queen, and of the council, to commit to prison. We have two versions of the answer that they gave, the one is in Anderson, *Reports*, vol. 1, p. 297, the other in Hallam, chap. 5. Both are singularly obscure—perhaps they are intentionally obscure—and there is a considerable difference between them. The judges manage to evade saying distinctly whether they will or whether they will not bail prisoners when the return to the writ of habeas corpus simply says that the prisoner was committed by the command of the king or the command of the council. They evidently think (as it seems to me) that the cause of the commitment *ought to be* assigned, but what they will do, if it is not assigned, they do not say. In the struggle of Charles's reign both parties claimed that 'the resolution in Anderson' was favourable to them: to me it seems to show that the judges of Elizabeth's day felt themselves in a great difficulty—and the difficulty grew greater; Coke himself, when Chief Justice, held that one committed by the council was not bailable by any court in England; he afterwards recanted his opinion in parliament, saying that he had been misled by an inapposite precedent.

It should be clearly understood that the judges of this time did not question the power of the council to act judicially and to sentence to imprisonment,—the jurisdiction of the Court of Star Chamber was not in debate—nor did they question the power of the council to commit to prison persons suspected of crime. The doubt was merely this—whether if the council committed to prison, the courts of common law would be prevented from considering whether the suspected person ought to be bailed—was the king's command or the command

¹ Proceedings on the Habeas Corpus brought by Sir T. Darnel and others, 3 Charles I, 1627, *State Trials*, vol. III, pp. 1—59. John Bilston's case (18 Edw. III, Rot. 33) was quoted by Coke, 24 March 1627, in the Commons but does not appear to have been cited in court, *ib.* p. 69.

of the council a sufficient answer to the writ of habeas corpus? If the return was that the prisoner was sentenced to imprisonment by the Star Chamber there would have been no talk of setting him free ; the doubt was as to persons who had not been tried: could the king prevent an investigation of their cases in a court of law, by telling the gaoler to return that they were imprisoned by the king's command?

Taking a general survey, everywhere we see difficulties before King Charles I. The system by which England has of late been governed is a questionable system, it is being questioned in parliament, it is being questioned in the law courts. The more men look back at history (and history is now being minutely examined for controversial purposes) the more they see that the constitution is not what it was under the Lancastrian kings—that the mode of government conflicts with unrepealed statutes, that there is at least plausible excuse for pronouncing a great deal of it illegal. Whether a wiser man than Charles could have averted or guided the coming storm, is a question over which we may well think ; but everywhere we see that the storm is coming.

C. *History of the Army.*

The last topic with which we can deal before passing to a new period is the history of the army—a matter of which we have hitherto said too little. After the Conquest the feudal tenures had supplied the king with troops ; but the feudal array was an extremely clumsy weapon. The tenant by knight service was only bound to serve for forty days in the year—and there was constant friction between the king and his barons as to the conditions of the service—were they bound to serve in Normandy? were they bound to serve in Germany?—on more than one famous occasion these questions were raised, and the embarrassed king had to make concessions. Already in 1159 Henry II took the first scutage, by way of composition for personal service¹. It is explained that his object was to spare the lives of his subjects and get

¹ Traces of scutage have been found as early as the reign of Henry I. Round, *Feudal England*, p. 268. See McKechnie, *Magna Carta*, pp. 86—90.

his foreign wars fought for him by mercenaries. Towards the end of his reign, in 1181, he revived and reorganized the ancient national force by his Assize of Arms. Apparently the idea of such a force had never ceased to exist; it had never become law that military service, at all events defensive military service, was limited by the system of military tenure. Every man, according to his degree, is to have suitable weapons—even the poorest free man is to have his spear and helmet. A national force, organized by counties, was thus created.

Henry III reissued the assize in an amplified form, and it forms the base of one of his son's great statutes, the Statute of Winchester. Its date is 1285, so there is just a century between it and the Assize of Arms¹. Every free man between the ages of fifteen and sixty is to have armour according to his wealth. There are five classes, ranging from him who has £15 of lands and 40 marks of goods, a habergeon, iron helmet, sword, knife and horse, down to him who is merely to have his bow and arrows. Twice a year the arms are to be viewed in each hundred by two elected officers called constables. These provisions occur in close connection with others enforcing the ancient duties of watch and ward, of hue and cry. If this national force is to be useful against the public enemy, it is to be useful also for police purposes, for apprehending malefactors and the like. Its officers you will observe are 'constables'—the title is originally a military title, which spreads downwards from the king's constable, who along with the king's marshall arrays and leads the royal forces. Even the lowest officers in the national force become constables; the constable of the township looks after the armour of the township, above him are the constables of the hundred; they again are below the constable, the high constable (as he comes to be called) of the county. The military duties of the constable of the township are from the first allied with the duty of keeping the peace and apprehending malefactors—the ancient village officers, the reeves, the headboroughs (chiefs of the frankpledge), become also the constables, and lose their older names.

¹ *Select Charters*, pp. 154—6, 469—74.

To return. The obligation of this armed force, defined by the Statute of Winchester, to take part in war offensive or defensive, is for a long while very indefinite. Of course it could not be contended that the king might send every able-bodied man out of the realm to serve in France. We find that Edward I commissions certain of his servants to choose out a fixed number of able-bodied men from their respective counties. In other words, he issues commissions of array. The forces thus levied he pays at his own cost. The troops from a county are under the command of a royal *capitaneus* or captain, in whom we may see the forerunner of the lord-lieutenant of later times. The sheriff would naturally be the head of the county force, and so in theory he remains; it is he who can raise the power of the county, the *posse comitatus*, for the pursuit of malefactors; but for actual warfare an annual officer (and permanent sheriffs the country will not stand) is not a good commander. So the sheriff loses his military functions at a time when the institution of permanent justices of the peace is sapping many other of his powers. Commissions of array become common under Edward II and Edward III, and the king does not always pay the soldiers whom he levies—he expects the counties to pay them; the counties were required to provide arms not prescribed by the Statute of Winchester, to pay the wages of men outside of their own area and even outside of the kingdom. Complaints of this become loud. In 1327 the commons petition that they be not compelled to arm themselves at their own cost contrary to the Statute of Winchester, or to serve beyond the limits of their counties, except at the king's cost. The petition was granted by statute (1 Edw. III, stat. 2, c. 5) in this modified form. 'The king wills that no man be charged to arm himself otherwise than he was wont in the time of his (the king's) progenitors, and that no man be compelled to go out of his shire, but where necessity requireth and sudden coming of strange enemies into the realm; and then it shall be done as hath been used in times past for the defence of the realm.' But Edward had to make a further concession. By statute (25 Edw. III, stat. 5, c. 8) it is accorded and assented that no man shall be

constrained to find men-at-arms, hobblers nor archers, other than those which hold by such services, if not by common assent and grant made by parliament. Apparently those statutes were habitually broken or evaded. In 1402 they were confirmed by statute (4 Hen. IV, c. 13), and they seem to have been observed during the Lancastrian reigns. The Welsh and Scottish wars of Henry VI were regarded as defensive, resistances of invasion, and the county forces could lawfully be called to meet them. The army whereby Henry V won his victories in France consisted partly of soldiers voluntarily enlisted who had the king's wages, partly of forces raised by lords who served the king by indenture, by special bargain. During the Wars of the Roses both sides used the king's name for commissions of array, and the country got thoroughly accustomed to intestine war, compulsory service, and extorted loans and benevolences. The statutes of Edward III remained on the statute book ; so did the Statute of Winchester.

The Tudor despotism was not enforced by any standing army ; that is one of the most noticeable things in the history of the time. One or two hundred yeomen of the guard and a few guards in the fortresses were the only soldiers that the king kept permanently in his pay. Commissions of array, however, were issued from time to time ; the counties were compelled to provide soldiers even for foreign service, and the statutes of an earlier time seem to have been disregarded and perhaps forgotten. An important act of 1557 (4 and 5 Philip and Mary, c. 3) takes no notice of the old acts, but speaks of mustering and levying men to serve in the wars as a recognized legal practice, and, as it seems to me, implicitly sanctions impressment by means of commissions of array, even impressment for foreign service. Certain offences when committed by the soldiers when mustered and levied are to be tried by the king's lieutenant, 'the lord-lieutenant' as he is here called. The usage of appointing a permanent lord-lieutenant for each county is said to date from this reign.

Another statute of this same year 1557 (4 and 5 Philip and Mary, c. 2) expressly repealed so much of every statute of earlier date as concerned the finding or keeping of horse or

armour; and it enacted a new scale of armour, which replaced that ordained by the Statute of Winchester. But this statute was itself repealed in 1603 by 1 James I, c. 25, an act which repealed in a wholesale fashion a large number of the Tudor statutes. No reason is given for the repeal; Hallam suggests that the accession to the English throne of the king of Scotland had removed the chief necessity for a defensive force. But the repeal had a perhaps unexpected effect. Until 1850 it was our law that if statute A be repealed by statute B, and then statute B be simply repealed by statute C, statute A is thus revived—so the Statute of Winchester came to life once more¹. Then in the days of Charles I it became matter of hot debate whether the armed force which the old statutes created was at the king's disposal. This force was just acquiring the new name of militia, and the control over the militia became one of the chief points of controversy between crown and parliament.

Meanwhile no standing army is kept up; for foreign warfare a temporary army is got together partly by virtue of feudal obligation, partly by voluntary enlistment, partly by impressment. However, in James's reign we find that the troops are not always disbanded immediately on their return to England, and we find that commissions of martial law are issued for their governance. Thus at the end of the reign, December, 1624, there are troops at Dover. A commission is issued to the Mayor and others empowering them 'to proceed according to the justice of martial law against such soldiers... and other dissolute persons joining with them...as commit any robberies, felonies, mutinies or other outrages or misdemeanours...and then to execute and cause to be put to death according to the law martial².' Of the very questionable legality of such commissions we have before spoken: here let us notice that only by such means could a standing army be held together. This, I think, has been the verdict of long experience, that an army cannot be kept together if its discipline is left to the ordinary common law. These commissions, you will observe, went far beyond matters of military

¹ 13 and 14 Victoria, c. 21. 5.

² Pat. Roll, 22 Jac. I, part 4, printed in Prothero, *Statutes and Constitutional Documents* (1559—1625), pp. 398—9.

discipline—they empowered the commissioners to try soldiers ‘and other dissolute’ persons for robberies and other felonies, as well as for mutinies. The difficulty of keeping a standing army was, as James’s successors found, a double difficulty—(1) that of maintaining any discipline without having recourse to illegal commissions, (2) that of paying troops without having recourse to illegal modes of raising money.

As regards the legality of pressing soldiers, we have this to remember in the king’s favour, and it is too often forgotten, that the legality of pressing sailors seems to have been fully admitted. From an early time, certainly through the fourteenth century, we find that the king presses sailors and presses ships for transport and for naval warfare. This is done by means of commissions closely similar to the commissions of array. But while the commissions of arraying soldiers excited much opposition, and parliament was constantly petitioning about them and sometimes succeeded in getting statutes passed limiting the king’s power, the pressing of sailors and ships seems not to have been a great grievance. All one hears by way of protest is that the sailors ought to be at the king’s wages from the time when they are on board ship. A statute of 1378 (2 Ric. II, c. 4) distinctly recognizes the lawfulness of the practice—it speaks of sailors arrested and retained for the king’s service, and provides a punishment for them if they run away. Many later statutes speak of pressing as a lawful process. There are several from the last century which do so by making exceptions; in these and those circumstances sailors are not to be impressed. No word in the Petition of Right or the Bill of Rights is directed against this prerogative; the class affected by it was, I suppose, too small to make its voice heard, or else the necessity of manning a navy was considered so great that the king’s power was never called in question.

PERIOD IV.

SKETCH OF PUBLIC LAW AT THE DEATH OF WILLIAM III.

WE pass over an exciting time, and placing ourselves at the quiet accession of Queen Anne, we ask what have been the legal and permanent results of the great events—Rebellion, Restoration, Revolution. The chronological sequence of these events we certainly ought to know; but we have not time for everything, and I think that we had better adopt an analytical rather than a historical treatment. What, then, is the constitution in 1702?

We can now say with some certainty that we have a composite sovereign body—the king, lords spiritual and temporal, and commons in parliament assembled. Let us first look at the constitution of each of these factors—how and by what right do they come to be what they are?

A. Constitution of the Kingship.

And first of the king. His title is now a statutory title if it be a title at all. Of course it is the opinion of a considerable number of persons that his title is bad; let us attempt to understand their opinion. Not to go back to the Middle Ages, to the parliamentary right of the House of Lancaster, the hereditary right of the House of York, we remember that Henry VIII came more than once to parliament for an act regulating the succession to the throne, even obtained an act enabling him in default of issue to leave the crown to whom he would. In Elizabeth's reign it was treason to affirm that the succession could not be settled by act of parliament. We have seen, however, that James, by the quiet consent of the nation, succeeded to the crown, though, if statutes on

such a matter had any validity, the succession was probably illegal; probably Henry VIII, in exercise of a statutory power, had preferred the issue of his younger to those of his elder sister. There was much therefore in his own case to set James on thinking that the inheritance of the crown was divinely appointed and was not to be meddled with by act of parliament. He was succeeded by his son Charles I, and when Charles I was murdered he was immediately succeeded by his son Charles II. I put the matter in that way because that was in 1702, and is even now the legal view of the matter, and we must not allow any sympathies or antipathies to interfere with our statement of the law. In 1702 it was not questioned that the first Charles had been murdered, and that the second began to reign on 30 January, 1649. On 29 May, 1660, the king began to enjoy his own again, but it already was his own and he had been reigning for eleven years and more. All the acts of the Long Parliament which had not obtained the king's assent were simply void. At the Restoration no statute was passed to declare them void; they were obviously void as having been made without the royal assent, and no repeal was necessary. In 1702 no lawyer would have appealed to them as law, and no lawyer would do so at the present day: they have no place in our statute book. This theory had been pressed far. On 16 March, 1660, the remains of the Long Parliament had declared itself dissolved. Elections were held without the king's writ—no decisive measure had yet been taken for inviting Charles to England—and a parliament, afterwards known as 'the Convention Parliament,' consisting of a few lords and the newly-elected commons, assembled on 25 April. It at once proceeded to enter into negotiations with Charles; on 7 May the houses resolved that the king should be proclaimed; on the 24th he set sail; on the 26th he landed; on the 29th he met the parliament. An act was at once passed declaring that the Long Parliament was dissolved (it had never been dissolved by the king, and so there might be question as to its dissolution) and that the lords and commons now sitting at Westminster in this present parliament are the two houses of parliament notwithstanding the fact that they had not been summoned

by the king's writ. Of course, however, if the king's writ of summons was necessary to the legal being of a parliament, this defect could not be remedied by a parliament which had come together without such writ—if it was not a true parliament, its own declaration could not make it so. This Convention Parliament sat on until December, 1660, and passed a number of acts. Another parliament met in May, 1661, and this of course was summoned by the king's writ in due form. It proceeded to pass an act confirming the acts of the Convention Parliament as though their validity might be questionable owing to the want of the king's writ. All therefore that was done at the Restoration was done on the theory that Charles II had reigned from the moment of his father's death.

Passing to the events of 1688 we see that it was extremely difficult for any lawyer to make out that what had then been done was lawful. What had happened was briefly this. In July, 1688, James had dissolved parliament, so that at the critical moment there was no parliament in existence. On 5 November William landed; on 11 December James fled from London and dropped the great seal into the Thames; on the 22nd he left the kingdom. William, Prince of Orange, invited an assembly. It was rapidly got together. He summoned the peers and such of the members of the parliaments of Charles II's reign (not James II) as were in London; the aldermen of London also were summoned. This, of course, the lawyer cannot but regard as a quite irregular assembly, called by one who is not, who does not profess to be king. The assembly met on 26 December, 1688, and it advised the Prince to summon a 'convention' of the estates of the realm. In accordance with this advice he invited the lords to come, and the counties and boroughs to send representatives to a convention on 22 January, 1689. The convention met. On 25 January the commons resolved that King James II having endeavoured to subvert the constitution of the kingdom by breaking the original contract between king and people, and by the advice of Jesuits and other wicked persons having violated the fundamental laws and having withdrawn himself out of the kingdom, has abdicated the government, and that

the throne has thereby become vacant. After some hesitation, on 12 February the lords agreed to this resolution, and it was resolved that William and Mary should be proclaimed king and queen. On 13 February the Houses waited on William and Mary and tendered them the crown, accompanied by the Declaration of Rights. The crown was accepted. The convention, thereupon following the precedent of 1660, passed an act declaring itself to be the parliament of England, notwithstanding the want of proper writs of summons. This Convention Parliament was not dissolved until early in 1690, and passed many important acts, including the Bill of Rights, which incorporated the Declaration of Rights. A new parliament met on 22 March, 1690, and this of course was duly summoned by writs of the king and queen. It proceeded to declare by statute that the king and queen were king and queen, and that the statutes made by the convention were and are laws and statutes of the kingdom.

Now certainly it was very difficult for any lawyer to argue that there had not been a revolution. Those who conducted the revolution sought, and we may well say were wise in seeking, to make the revolution look as small as possible, to make it as like a legal proceeding, as by any stretch of ingenuity it could be made. But to make it out to be a perfectly legal act seems impossible. Had it failed, those who attempted it would have suffered as traitors, and I do not think that any lawyer can maintain that their execution would have been unlawful. The convention hit upon the word 'abdicated' as expressing James's action, and, according to the established legal reckoning, he abdicated on the 11 December, 1688, the day on which he dropped the great seal into the Thames. From that day until the day when William and Mary accepted the crown, 13 February, 1689, there was no king of England. Possibly the convention would better have expressed the truth if, like the parliament of Scotland, it had boldly said that James had forfeited the crown. But put it either way, it is difficult for a lawyer to regard the Convention Parliament as a lawfully constituted assembly. By whom was it summoned? Not by a king of England, but by a Prince of Orange. Even if we go back

three centuries we find no precedent. The parliaments of 1327 and of 1399 were summoned by writs in the king's name under the great seal. Grant that parliament may depose a king, James was not deposed by parliament; grant that parliament may elect a king, William and Mary were not elected by parliament. If when the convention met it was no parliament, its own act could not turn it into a parliament. The act which declares it to be a parliament depends for its validity on the assent of William and Mary. The validity of that assent depends on their being king and queen; but how do they come to be king and queen? Indeed this statute very forcibly brings out the difficulty—an incurable defect. So again as to the confirming statute of 1690.

Do not think that I am arguing for the Jacobite cause. I am only endeavouring to show you how much purely legal strength that cause had. It seems to me that we must treat the Revolution as a revolution, a very necessary and wisely conducted revolution, but still a revolution. We cannot work it into our constitutional law.

Passing from this point, we notice that the tender of the crown was made to William and Mary jointly; but William had refused to reign merely in his wife's right—such as it was—and the declaration of the convention was that William and Mary were to hold the crown during their joint lives and the life of the survivor of them, that, however, the sole and full exercise of the regal power was to be in William during their joint lives, but was to be exercised in the names of William and Mary, and that after their deceases the crown should go to the issue of Mary, and in default of her issue to the Princess Anne and the heirs of her body, and for default of such issue to the heirs of the body of William. The Bill of Rights, passed in 1689, confirmed this settlement, adding a clause to the effect that any person who should hold communion with the See or Church of Rome or profess the Popish religion or marry a Papist should be incapable to inherit, possess or enjoy the crown and government of the realm, and that the crown should pass to the person next entitled. In 1700, after the death of Mary, William being childless, and Anne's son the Duke of Gloucester being dead, it became

necessary to make a further settlement, and by the Act of Settlement (12 and 13 Will. III, c. 2) it was ordained that in default of issue of Mary, Anne, and William the crown should go to the Princess Sophia of Hanover and the heirs of her body being Protestants. She, a daughter of Elizabeth Queen of Bohemia, a daughter of James I, was the nearest heir according to the ordinary rules of inheritance, if Roman Catholics were excluded.

A new form of coronation oath has been provided. About the coronation oath there has been controversy. In the reign of Charles I it became known that the king had taken an oath which differed in some respects from the ancient form. That ancient form has come before us already. In it the king promised to hold and keep the laws and righteous customs which the community of the realm shall have chosen—*quas vulgus elegerit, les quels la communauté de vostre royaume aura esleu*. Now at Charles's coronation the last question put to him had been this: 'Will you grant to hold and keep the laws and rightful customs which the communalty of this your kingdom have, and will you defend and uphold them to the honour of God as much as in you lieth?' This form, you will observe, does not assert the right of the people, the community of the realm, to choose its own laws: the king is to hold and keep the laws which the communalty *has*. Archbishop Laud was accused of having tampered with the oath. His defence seems on this point to have been quite sound. He had administered the oath in the terms in which it had come to him, the terms to which James I had sworn, the terms to which Elizabeth had sworn. As to Mary's oath I know nothing; but a change had been made on the occasion of Edward VI's accession. He had sworn to make no new laws but such as should be to the honour and glory of God and to the good of the commonwealth, and that the same should be made by consent of his people as hath been accustomed.

But a change seems to have been made yet earlier. There is extant a copy of the coronation oath in which alterations have been made in the handwriting of Henry VIII¹. The last

¹ A facsimile of the oath with Henry's corrections is given in *English Coronation Records*, ed. L. G. Wickham-Legg, pp. 240—1.

clause reads thus—I will note the changes made by the king's own hand—'And that he shall graunte to hold the laws and [approvyd] customes of the realm [lawfull and nott prejudicial to his Crowne or Imperiall duty], and to his power kepe them and affirm them which the [nobles and] people have made and chosen [with his consent].' The interpolations are very remarkable: they seem to point to the notion of an indefeasible royal power which laws cannot restrain; the king will not bind himself to maintain laws prejudicial to his crown. Thus since the accession of Edward VI the terms of the oath seem to have varied—and Laud, I believe, successfully showed that he could not be charged with any insidious alterations¹. But the meaning of the more ancient form, the form of Edward II's oath, now became a subject of bitter controversy; it was maintained that the *elegerit*—'*quas vulgus elegerit*'—could not refer to the future: the kings are to uphold the old law, the law which the people had chosen, not the laws which the people should choose. On the other hand, it was even urged that the terms of the oath excluded the king from all share in legislation—that without perjury he could reject no bill passed by two Houses. Neither contention would harmonize with past history; on the one hand the old oath was a not indistinct declaration that there were to be no laws save those chosen by the community of the realm; on the other hand the contention that the king was no part of the community was wild. However, when such opposite views were taken of the king's obligation, the time for war had come.

The oaths of Charles II and James II seem to have been just those which Charles I had taken. Immediately after the Revolution a new oath was provided by a statute (1 William and Mary, c. 6) which recites that the old oath was framed in doubtful words and expressions with relation to ancient laws and constitutions at this time unknown. The most important phrase is this—the king promises to govern the people of England and the dominions thereto belonging according to the statutes in parliament agreed on, and the laws and customs

¹ The question is discussed by J. Wickham-Legg, *The Coronation Order of King James I*, London, 1902, pp. xcvi—cii.

of the same ; thus 'the statutes in parliament agreed on' take the place of *leges quas vulgus elegerit*.

By another clause in the oath the king has to swear that he will maintain to the utmost of his power the true profession of the gospel and the protestant reformed religion established by law, and preserve unto the bishops and clergy of the realm and the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them. Another obligation is laid upon the king by the Bill of Rights and by the Act of Settlement: on the first day of his first parliament he must make the declaration against transubstantiation, the invocation of the saints and the sacrifice of the mass. The clauses which deprive him of his crown in case he holds communion with the Church of Rome or marries a Papist, have already come before us.

B. *Constitution of Parliament.*

We turn to speak of the composition of parliament. The number of the lords spiritual, the mode of their appointment, has not been changed: they are now a small minority in the Upper House. But though we have here to chronicle that things are as they were, still we must remember that there has been a period during which the bishops have had no place in parliament. The royal assent to an act excluding them was given on 13 Feb. 1642—this was one of the last concessions extorted from Charles. They were not restored by the Convention Parliament, but were restored by the second parliament of Charles II in 1661. They took their seats on 20 Nov., after an interval of nineteen years.

The number of temporal peers has greatly increased. To Elizabeth's last parliament, 1597, 56 were summoned. To James's first parliament, 1604, 78. To the first parliament of Charles I, 97. To the parliament of 1661, 142. To that of 1685, 145. The grant of a peerage has been used as a political reward. As to the mode of creating peers there is little to be added to what has already been said. It has, however, been decided that a peerage cannot be bound up with the possession of a tract of land ; peerage by tenure is regarded as extinct. Also it has now become the quite definite rule that a summons

by name to parliament, followed by an actual sitting, confers a hereditary peerage. However, for a long time past all peers have been created by letters patent.

Here again we have to remember that there has been a short breach of continuity, not indeed in law, but in fact. During the Civil War the number of lords who attend parliament is small—it becomes thirteen or thereabouts. On the eve of the king's trial on 4 Jan. 1649, the commons voted that 'the commons of England in Parliament assembled do declare that the People are under God the original of all just power, and that whatsoever is enacted or declared for law by the commons in Parliament assembled, hath the force of law ...although the consent and concurrence of the King or House of Peers be not had thereunto.' On 6 Feb. the lords sat for the last time. On 19 March the commons passed an act for abolishing the House of Peers. On 25 April, 1660, the lords reappear once more in the Convention Parliament, after an interval of eleven years. Their case must be distinguished from that of the bishops. The bishops were deprived of their seats by a statute passed by king, lords and commons; it required a statute to recall them: the temporal lords were excluded simply by the act of the commons, an act which so soon as the Restoration was agreed on, was regarded simply as null and void.

The numbers of the House of Commons have grown. In the first parliament of James there were 467 members. In the Long Parliament (1640), 504. In the parliament of 1661, 507; in 1679, 513. The causes of the increase have been various. In 1672 a statute admitted two knights for the County Palatine of Durham, and two citizens for the city. Except in this respect the representation of the counties remains unaltered. We have seen that under Edward VI, Mary, Elizabeth, and James, the number of borough members was increased by royal charter—thus it was hoped that a House favourable to the crown might be returned. Charles I added, or restored, I think, eighteen borough members¹. Charles II exercised

¹ 'Restoration' is the right word. The nine boroughs restored to parliamentary rights under Charles I were however restored by resolution of the commons not by royal charter. Porritt, *The Unreformed Parliament*, vol. 1, p. 382.

this prerogative but once, he gave Newark two members. This is the last exercise of this prerogative, and it did not pass quite unquestioned. For a long time past the commons had looked jealously on this power. They had claimed to themselves the right of deciding whether a borough had the right to send members—and most of the additions made by Charles I to the House were by way of reviving boroughs which, according to the decision of the House, had once returned members, but had discontinued the practice of sending them. The right to send members was now becoming a coveted right, and boroughs sought to show that they had exercised this right in remote times. The representation of the two Universities is due to James I. The prerogative of increasing the number of borough members was never taken away—but it was last exercised in favour of Newark in 1677—and after the Restoration the House of Commons would have resented its exercise: though it is curious to observe that the excellent whig, John Locke, agreed that if the House would not reform itself, the king might reform it¹. Thus the number of members became finally fixed at 513; 24 for Wales, 80 for the English counties, 4 for the Universities, the rest for the English boroughs; these, with the 45 Scottish members added under Anne, and the 100 Irish members added under George III, brought up the total to 658. This was the number in 1832.

Though from the legal point of view this is no precedent, still we do well to observe that in the parliament of 1656, the third of Cromwell's parliaments, Scotland and Ireland are represented². It consists of 459 members: 375 English, 24 Welsh, 29 Scottish, 31 Irish.

The electoral qualifications remain what they have been. In the counties the electors are still the forty-shilling freeholders. In the boroughs there is the utmost variety. On the whole, the tendency has been towards vesting the right to elect representatives in an oligarchic governing body. In many cases the crown procured a surrender of an old charter and granted

¹ *Civil Government*, c. XIII.

² Irish and Scottish members sat in the Barebones Parliament (1653) and again, in accordance with the provisions of the Instrument of Government, in the Parliament of 1654.

a new. Under Charles II a plan was conceived for hastening this process. An attack was made on the charters of the city of London, and they were declared to be forfeited. It was a principle of law that if a charter was abused it was forfeited, and it was alleged that the citizens of London had in some not very important respects abused their corporate powers. Their charter was declared to be forfeited. In terror at this judgment many of the boroughs of England surrendered their charters, and received new charters vesting the right of election in governing bodies nominated by the king¹. By these means James II obtained a very subservient parliament. After the Revolution—in 1690—the judgment against the city of London was declared void by statute. Some of the boroughs which had surrendered their charters and taken new ones, got back their old charters on the ground that the surrender was unlawful, but this was not always the case—in some instances the surrenders were adjudged lawful. Altogether, therefore, the constitution of very many boroughs had become oligarchic. After the Revolution many of them fall under the influence of great land-owners and become pocket boroughs. Already in William's day the distribution of seats presents many of those anomalies which are abolished in 1832. Shortly after the Revolution Locke wrote thus—'We see the bare name of a town, of which there remains not so much as the ruins, where scarce so much housing as a sheep-cote, or more inhabitants than a shepherd is to be found, sends as many representatives to the grand assembly of law makers as a whole county, numerous in people and powerful in riches. This strangers stand amazed at².'

The power of determining all questions as to contested elections, the House of Commons has now got into its own hand—and it jealously resents any interference by the king, the House of Lords, or the courts of law. Too often its decision is simply the result of a party division.

As to the qualification of those elected. The act of Henry V is still on the statute book, and it requires that the knights and burgesses shall be resident in the shires and towns

¹ Porritt, vol. I, pp. 393—6, 399—405.

² *Civil Government*, c. XIII.

which they represent; it will not be repealed until 1774, but since the days of Elizabeth it has been habitually disregarded. There is no property qualification—though we are on the eve of getting one—for in 1710 (9 Anne, c. 5) a statute is passed providing that a knight of the shire must have an estate of land worth £600 per annum, a burgess one worth £300.

Of late there has been a great noise against the number of place-men in parliament—at present there is no law against them—but the Act of Settlement (1700, 12 and 13 Will. III, c. 2) has lately provided ‘that so soon as the House of Hanover shall come to the throne, no person who has an office or place of profit under the king, or receives a pension from the crown, shall be capable of serving as a member of the House of Commons.’ This momentous clause never came into force: it was repealed in 1705 before the House of Hanover came to the throne. Had it ever come into play it must have altered the whole history of the House of Commons; no minister of the king would ever have been able to sit there. Macaulay says that the result would have been to make the House of Lords the most august of senates, while the House of Commons would have become little better than a vestry¹. The plan in 1707, by a statute which still is the fundamental law on this subject, was that the acceptance of an old office, i.e., one created before 25 October, 1705, should vacate the seat, but that the office holder should be capable of reelection, while on the other hand no holder of a new office, an office created since that date, should be capable of sitting at all². The clause in the Act of Settlement, to which we have just referred, is a good reminder that our modern system of ministerial government is modern; in 1700, let us repeat it, parliament ordains that there shall be no ministers in the House of Commons.

C. *Frequency and Duration of Parliaments.*

And now as to the frequency of parliaments. It is impossible to speak in general terms; each parliament of the time that we are surveying has its own very peculiar history. The first parliament of Charles I met on 17 May, 1625, and

¹ *History of England*, c. XIX.

² New offices have however been created by subsequent statutes to which this disability does not attach.

was dissolved on 12 August, the commons protesting, and no grant of tonnage and poundage having been made. The second parliament met on 6 February, 1626, and was dissolved on 15 June without passing a statute; the king was at issue with both Houses as to their privileges. The third parliament met on 17 March, 1628, and sat until 26 June, when it was prorogued. It sat a second time on 20 January, 1629, and was dissolved on 10 March. To its first session we owe the Petition of Right. Then for hard on eleven years there is no parliament. The fourth (a short) parliament met on 13 April, 1640, and was dissolved on 5 May—after less than a month; the king had got no supply. On 24 September Charles had recourse to a *magnum concilium* of peers held at York—the last occasion on which such a body has met—but got nothing from it, save advice to summon a parliament. One was summoned; it met on 3 November, 1640, and became the Long Parliament. We may say that it remained in legal being for twenty years, that it was never lawfully dissolved until in 1660 a statute of the Convention Parliament declared its dissolution. But we may rapidly trace its history. It met on 3 November, 1640, and sat on steadily until 22 August, 1642, when the king's standard was raised at Nottingham, and long afterwards. In the meantime, however, before the war broke out, not only had it procured the attainder of Strafford, the exclusion of the bishops from the House of Lords, the abolition of the Star Chamber; but further two acts were passed which particularly concern us here. In the first place on 15 February, 1641, the royal assent was obtained to the Triennial Act (16 Car. I, c. 1). This enacts that a parliament shall be held in every third year; if the Chancellor does not issue writs, then the peers are to meet and issue writs for the election of the representatives of the commons, and if the peers make default, then the sheriffs and mayors are to see to the election. No parliament, again, was to be dissolved or prorogued within fifty days after its meeting. The old statutes of Edward III which directed that a parliament should be held in every year or more often if need be were not repealed¹. But a more

¹ Gardiner, *Constitutional Documents of the Puritan Revolution*, 2nd ed., pp. 144—55.

momentous concession was extorted on 17 May, 1641; the king gave his assent to a bill which declared that the present parliament shall not be dissolved unless it be by act of parliament to be passed for that purpose; nor shall it be prorogued or adjourned unless by act of parliament, and the houses shall not be adjourned unless by themselves or their own order. Thus the parliament provided that it should continue to exist during its own good pleasure. It continued sitting during the Civil War, after 1649 as a parliament without lords. On 7 December, 1648, the army which had become masters of England, violently expelled (Pride's purge), or as the phrase went, 'secluded' the majority of the house, a hundred and forty-three members of the Presbyterian party. The Rump that was left at once proceeded to erect a court of justice for the king's trial. This Rump of the Long Parliament went on sitting until 20 April, 1653—in 1651 it had voted that it would continue sitting until November, 1654—but meanwhile Cromwell put an end to its prating.

On 4 July, 1654, there appears the collection of persons known as the Little Parliament or Barebone's parliament—140 persons, not elected by the country, but nominated by the council of officers; it sat until 12 December, and then dissolved itself. On 3 September, 1654, met the second of Cromwell's parliaments, if we reckon the Barebone's assembly as the first; it was a body of 400 elected members, elected according to a scheme settled by the Long Parliament in 1650; there was some redistribution of seats, and the county franchise was extended to any persons having real or personal property to the value of £200. On 22 January, 1655, Cromwell dissolved this body. His third parliament met on 17 September, 1656; it offered him the kingly title which he refused; it instituted an upper house consisting of his nominees, and then fell quarrelling as to whether this was a House of Lords. On 4 February, 1658, he dissolved it; on 3 September he died. Power had been given him to appoint a successor to the office of Lord Protector, and it seems that he had appointed his son Richard, though by no formal instrument. On 27 January, 1659, a parliament met; the military council of officers could not get on with it, and on 22 April Richard dissolved it. On

7 May the officers restored the Rump, the members of the Long Parliament not excluded in 1653; again they were expelled, and again they were restored—the secluded members returned. On 16 March, 1660, this Long Parliament passed a bill declaring itself dissolved, and taking order for the holding of a new parliament on 25 April.

That parliament was the Convention Parliament, and of some of its doings we have already spoken. With the king's assent, for Charles was restored in May, it passed an act declaring the dissolution of the Long Parliament; it was dissolved on 29 December, 1660. Charles's second parliament met on 8 May, 1661, and was not dissolved until 31 December, 1678, having thus sat between seventeen and eighteen years.

During this time it held sixteen sessions. Really it was a much longer parliament than what is called the Long Parliament—which had not sat thirteen years before Cromwell packed it off, though it maintained a notional existence for seven years longer. On 6 March, 1679, Charles's third parliament met; it was prorogued in May, dissolved in July. His fourth parliament met on October 17 in the same year, but did not sit for business until October, 1680; it sat until January, 1681, when it was dissolved. The fifth and last is the Oxford Parliament, which met on 21 March, 1681: sat but for a week and was then dissolved. From March, 1681, until his death in February, 1685, Charles reigned without a parliament. But we must go back for a moment. We have seen that the first act of the Long Parliament (16 Car. I, c. 1) was a Triennial Act (1641), which provided machinery for the assembling of a parliament once in every three years: if the king neglected to summon it, it would meet without his summons. In 1664 this act was repealed as being in derogation of the king's just rights. Instead thereof it was enacted (16 Car. II, c. 1) that the sitting and holding of parliament shall not be intermitted or discontinued above three years at the most—but no machinery was provided for the assembling of a parliament in case the king should neglect his statutory duty of calling one. It supersedes, we may say, though it does not repeal the acts of Edward III as to parliament being held once in every year, or more often if need be: it is the

king's statutory duty to call a parliament together once at least in every three years, but if he neglects to do this there is no lawful manner in which a parliament can come together. Twenty years afterwards Charles II, as we have just seen, violated the act. He dissolved the Oxford Parliament in March, 1681, and had not summoned another when he died in February, 1685.

James held but one parliament; it met 19 May, 1685, held two sessions in that year, was prorogued on 20 November, 1685, and never sat again for business, though it was not dissolved until July, 1687.

We have already spoken of the Convention of 22 January, 1689, which became the first parliament of William and Mary. One of the clauses of the Declaration of Rights incorporated in the Bill of Rights declared that for redress of grievances, and for the amending, strengthening and preserving of the laws, parliaments ought to be held frequently. The Triennial Act of 1664, however, was left standing. The second parliament met on 20 May, 1690; it held six sessions and was dissolved in the autumn of 1695. Meanwhile it had passed another Triennial Act—carefully to be distinguished from the acts of 1641 and 1664. It was passed in 1694 (6 and 7 William and Mary, c. 2). This act was directed not so much against intermissions of parliament, though it repeated what was already law, namely, that a parliament shall be holden once in three years at least, but against long parliaments: no parliament is to endure for more than three years—it is then to die a natural death. As to this present parliament, it is to cease on 1 November, 1696. William dissolved it when it was just about to expire. William had rejected this Triennial Act in 1693; this is one of the last instances of the royal assent being withholden. It remained in force until the Septennial Act was passed in 1715 (1 Geo. I, st. 2, c. 38). William met his third parliament in November, 1695; it sat again in 1696 and 1697. Another met in 1698, and sat again in 1699 and 1700. A fourth met in 1701, and was in existence on 3 March, 1702, when the king died. I think that in the whole course of English history it had only once happened that a reigning king had died during the existence of a parliament—he was

Henry IV¹. It had, however, been accounted well-settled law that the king's death, the demise of the crown, would dissolve parliament; just as it would deprive the judges and all officers of state who held their commissions from the king of their powers. But shortly before William's death, in 1696, an act had been passed to obviate this evil result—if the present king dies when there is a parliament, it is to continue in existence for six months, unless sooner dissolved by his successor; if there is no parliament when he dies, the last parliament is to come together and be again a parliament. The grave possibility of a disputed succession led to this act. It applied only to the case of King William; in 1707 (6 Anne, c. 41, sec. 4) the rule was generalized. In 1867 (30 and 31 Vic. c. 102, sec. 51) it was enacted that the demise of the crown should have no effect on the duration of parliament, and thus the rule as to six months was abolished.

It will be needless hereafter to speak of the actual duration of parliaments. Since the Revolution the principle that parliament shall sit in every year, has been secured by very efficient means which will soon come before us. This is one of the great results of the period which is now under our consideration. Of the other results let us take a brief review under six heads.

D. *The Question of Sovereignty.*

The first question which a student of modern jurisprudence is likely to ask on turning to consider a political constitution is, Where is sovereignty? I have before now given my reasons why we should not ask this question when studying the Middle Ages—why we should understand that no answer can be given.

Gradually, and as a result of long continued struggles, the question emerges, and it is not settled without bloodshed.

In the middle of the century Hobbes, in his vigorous writings, had sharply stated the theory that a sovereign there must be—some man or body of men whose commands are laws—and though Hobbes had no great following, still this theory told on the world. Now I think that at the outset of our

¹ Henry VIII and James I died during the existence of a parliament.

period there were three claimants for sovereignty, (1) the king, (2) the king in parliament, (3) the law. As a matter of history the claims of king and parliament certainly seem to us the best founded. We have seen that the practical despotism of the Tudors had laid a terrible emphasis upon the enormous powers of parliament—there was nothing that parliament could not do—it could dissolve the ancient dual constitution of church and state, it could place the church under the king, it could alter the religion of the land, it could settle the royal succession, it could delegate legislative powers to the king, it could take them away again. I think that the statesmen of Elizabeth's reign, witness Sir Thomas Smith, had distinctly held that king in parliament was absolutely supreme, above the king and above the law. Still for the king there was a great deal to be said—more, as I think, than modern writers are inclined to allow, and this even apart from those theories of divine right which were generally held by the monarchical party. Those theories, which became current under James I, we must leave on one side; they belong rather to the domain of political philosophy, than to that of constitutional law. It is more within our scope to observe that it must have been a hard feat to conceive of sovereignty as vested in the parliamentary assembly. Consider how very much that assembly depends for its constitution, for its very existence, on the king's will. It comes when he calls it, it disappears when he bids it go; he makes temporal lords as he pleases, he makes what bishops he pleases, he charters new boroughs to send representatives. After all, is not this body but an emanation of the kingly power? The king does well to consult a parliament—but is this more than a moral obligation, a dictate of sound policy? As to old acts of the fourteenth century, a question of sovereignty cannot possibly be decided by an appeal to ancient documents.

The high-water mark of this theory is to be found in some of the judgments delivered in the Ship Money case. I will read a few sentences.

Crawley, J. 'This imposition without parliament appertains to the king originally, and to his successor *ipso facto* if he be a sovereign in right of his sovereignty from the crown.



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